

1                   IN THE UNITED STATES DISTRICT COURT  
2                   IN AND FOR THE DISTRICT OF DELAWARE

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4           XPERTUNIVERSE, INC.,                   :   CIVIL ACTION  
5   :     
6                           Plaintiff,           :     
7   :     
8                           vs.                   :     
9   :     
10           CISCO SYSTEMS, INC.,               :     
11   :     
12                           Defendant.         :   NO. 09-157 (RGA)

13                                   - - -

14                                   Wilmington, Delaware  
15                                   Friday, March, 2013  
16                                   1:33 o'clock, p.m.

17                                   - - -

18           BEFORE:   HONORABLE RICHARD G. ANDREWS, U.S.D.C.J.

19                                   - - -

20           APPEARANCES:

21                           POTTER, ANDERSON & CORROON LLP  
22                           BY:   PHILIP A. ROVNER, ESQ.

23                                   -and-

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Valerie J. Gunning  
Official Court Reporter

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P R O C E E D I N G S

(Proceedings commenced in the courtroom,  
beginning at 1:33 p.m.)

THE COURT: All right. Good afternoon,  
everyone. Please be seated.

All right. So we're here, I guess, for the  
usual agenda items to which Mr. Blumenfeld wanted to add  
one, but let's get with the main point here, which is  
Dr. Nourbakhsh, the Daubert.

I take it probably Mr. McCraw and Mr. Cantine,  
you're going to call him for his testimony?

MR. CANTINE: Mr. Sobel is, your Honor.

THE COURT: Mr. Sobel. Sorry. Sorry. Yes.  
Mr. Sobel. Go ahead.

MR. SOBEL: All right. I call Dr. Illih  
Nourbakhsh, who we are tendering as an expert in the  
contacts industry.

PLAINTIFF'S TESTIMONY

... ILLIH R. NOURBAKSH, having been  
duly sworn as a witness, was examined and  
testified as follows ...

THE COURT: Good afternoon, Doctor.

THE WITNESS: Good afternoon.

1 THE COURT: Mr. Sobel?

2 MR. SOBEL: Yes, your Honor.

3 THE COURT: You may proceed.

4 MR. SOBEL: I want to mark some exhibits,  
5 Plaintiff's Daubert Hearing Exhibits 1, 2 and 3.

6 THE COURT: All right. What are they?

7 MR. SOBEL: The first, Exhibit 1 is the expert  
8 report of Professor Nourbakhsh.

9 THE COURT: All right.

10 MR. SOBEL: And I have two copies for the Court.

11 Exhibit 2 is the rebuttal report of Professor  
12 Nourbakhsh.

13 And Exhibit 3 is the declaration of Professor  
14 Nourbakhsh, dated January 15th, 2003 -- 2013. Pardon me.

15 (Mr. Sobel handed exhibits to the Court.)

16 THE COURT: All right. And they're admitted for  
17 the purposes of this hearing.

18 (Plaintiff's Daubert Hearing Exhibit No. 1, 2  
19 and 3 were admitted into evidence.)

20 MR. SOBEL: May I provide them to the witness,  
21 your Honor?

22 THE COURT: I'm sorry? Okay. Yes.

23 (Mr. Sobel handed exhibits to the witness.)

24 DIRECT EXAMINATION

25 BY MR. SOBEL:

Nourbakhsh - direct

1 Q. Dr. Nourbakhsh, before you, can you identify the  
2 documents that you have in front of you?

3 A. The documents are what you stated they are.

4 Q. Okay.

5 A. My expert report, my rebuttal report, and the  
6 declaration I prepared afterwards.

7 Q. Did you prepare those?

8 A. I did.

9 Q. Okay. And those would reflect all your opinions?

10 A. They are all my opinions, yes.

11 Q. Okay. Dr. Nourbakhsh, can you tell us what degrees  
12 you currently hold?

13 A. I have a Bachelor's degree, a Master's degree, and a  
14 doctoral degree in Computer Science from Stanford  
15 University.

16 Q. Okay. And since completing your doctoral degree from  
17 Stanford, what have you been doing?

18 A. After I finished my doctoral degree, actually doing my  
19 doctoral degree, I started a company call Blue Pumpkin  
20 Software with some associates and, and I chose having that  
21 company and being a Professor at Carnegie Mellon University  
22 for the next several years. I continue to be a Professor at  
23 Carnegie Mellon now.

24 Q. And you're a Professor in Computer Science at Carnegie  
25 Mellon?

Nourbakhsh - direct

1 A. That's correct.

2 Q. Have you taught any classes, undergraduate, graduate  
3 level at Carnegie Mellon?

4 A. Yes. I teach undergraduate/Master's/Ph.D level  
5 classes in areas such as computer science, artificial  
6 intelligence, systems engineering, principles of human  
7 machine and human interaction and ethics technology.

8 Q. Okay. And what's ethics technology?

9 A. I teach a class where we look at the American code for  
10 engineering ethics and trying to understand what it means  
11 for engineers to behave ethically in designing new systems  
12 and in deploying those systems to the public.

13 Q. Okay. And in connection with your lecturing, can you  
14 tell us some of the subjects that you've lectured on while  
15 at Carnegie Mellon?

16 A. Sure. The subjects that I lectured on range from the  
17 software end of planning and scheduling optimization to what  
18 systems engineering is about, which is really how you put  
19 together complex systems in lots of small parts and prove  
20 properties about the system as a whole all the way to human  
21 machine interaction, where we design systems that are  
22 designed to interact with people in the usual effective ways  
23 so they want to do their job better.

24 Q. And in paragraph 4 of your initial report, that's  
25 Exhibit 1, does that reflect, accurately reflect some of the

Nourbakhsh - direct

1 other subjects you've lectured on?

2 A. Yes. In artificial intelligence, we cover subjects  
3 such as ontology, knowledge systems, knowledge mapping  
4 systems, machine learning, and signal processing.

5 Q. Okay.

6 A. All of those fall under the rubric of artificial  
7 intelligence in my field.

8 Q. And you've also performed research and development in  
9 the areas relating to the contact center industry?

10 A. Yes. The recent development I've done for the contact  
11 center area is primarily because of the company that I  
12 founded and my positions in that company led me to develop  
13 IP for the company and develop products that we then  
14 marketed to contact centers for major corporations around  
15 the world.

16 Q. Okay. I want to go into Blue Pumpkin in a minute.

17 Let's just cover a few more things.

18 If you will turn to Exhibit B of your initial  
19 expert report, can you identify that document for us?

20 A. That's my curriculum vitae.

21 Q. Okay. And it lists your professional activities, your  
22 speaking engagements, your publications and the patents that  
23 you have in your name; is that correct?

24 A. That's correct.

25 Q. Okay.

Nourbakhsh - direct

1 A. Among other things.

2 So I see from your curriculum vitae, you have a  
3 total of 13 United States patents. Do any of them relate to  
4 any of the technology in this case?

5 A. None of them relate directly to the technology that  
6 I've been studying in terms of XpertUniverse and the Cisco  
7 case, but I think about half of them relate to technology in  
8 the contact center space in general.

9 Q. Okay. So about half of them relate to the contact  
10 center industry; is that right?

11 A. Yes. And specifically to software for the contact  
12 center industry that enables the contact center to run more  
13 efficiently and in a way that's better for the employees and  
14 the managers.

15 Q. All right. And that industry is the industry that the  
16 XpertUniverse technology falls into; is that right?

17 A. That's correct. The way I've looked at the  
18 XpertUniverse technology and application, it's the same  
19 general area as the patents that I hold, yes.

20 Q. Okay. Now, out of the -- your publications, have you  
21 published in the contact center industry field?

22 A. I have. I've published several articles in some major  
23 trade rags and journals in the contact center space as well  
24 regarding the technologies we worked on and the innovations  
25 we had at Blue Pumpkin.

Nourbakhsh - direct

1 Q. Okay. Let's move on and talk about Blue Pumpkin. You  
2 mentioned that a couple times, that you founded Blue  
3 Pumpkin. I think you said co-founded.

4 Did you co-found it?

5 A. Yes. There were three of us who were friends and we  
6 co-founded it together.

7 Q. Okay. And what was your role with Blue Pumpkin?

8 A. Early in the startup company, you do everything, so  
9 you're presenting to venture capitalists, raising money and  
10 working on financials for the company.

11 Because I was a technologically oriented person,  
12 I also was responsible early on in developing a vision and  
13 strategy on what the needs for the contact center were, so I  
14 organized relationships with a lot of contact centers in the  
15 San Francisco Bay area and elsewhere in the U.S.

16 And I worked on everything from sort of  
17 technological analysis. We go from needs to solutions, what  
18 do contact centers needs, how do they tick today, what kind  
19 of software do they use, and then from that we tried to  
20 derive understandings of what's the new software that they  
21 need.

22 Developing the software was something that was  
23 under my umbrella. I was responsible for managing the  
24 market requirement document and writing process for a couple  
25 of major products that we had, and then doing pricing

Nourbakhsh - direct

1 surveys with customers, to understand how much they should  
2 cost to be worth buying. And then doing pilot testing with  
3 customers, pilots that we had, doing training, writing  
4 manuals, and interviewing afterwards to see if it's really  
5 useful, and then at some point handing it out to marketing  
6 and sales to see if we could sell on a larger scale.

7 Q. Okay. So I will ask you a couple followup questions  
8 on that. Thank you.

9 So Blue Pumpkin, when they were in the business  
10 of developing software for the contact center, is that what  
11 you are saying?

12 A. That's correct.

13 Q. Okay. And that was in the United States and elsewhere  
14 as well?

15 A. It was international.

16 Q. Okay.

17 A. I think we had sales easily in the thousands all over  
18 the world.

19 Q. Okay. And you were chief scientist and chief  
20 technology officer at Blue Pumpkin?

21 A. Yes. I started off as chief technology officer. Once  
22 I became a professor, you can't be a director of a company  
23 when you are a professor in the U.S. by some state laws, so  
24 I became chief scientists and played an advisory role.

25 Q. All right.

Nourbakhsh - direct

1       A.       And later actually to more fully integrate some more  
2       software, I actually went on sabbatical from Carnegie Mellon  
3       to go back to Blue Pumpkin and play a product management  
4       role.

5       Q.       All right. And why was it necessary to take a  
6       sabbatical from Carnegie Mellon and to work full-time for  
7       Blue Pumpkin?

8       A.       Well, my friends, the co-founders asked me if I would  
9       be willing to, and I was happy to do it because there was a  
10      new niche on the marketplace that had to do with contact  
11      center software that helps them really think about hiring  
12      and strategies for contact centers over a five to ten-year  
13      period of time. Nobody had software for that.

14               So I went back and did an ethics analysis of my  
15      contact centers for that reason, designed a product, put a  
16      team together and we turned that into a product.

17      Q.       Okay.

18      A.       As it turned into a product and matured, then I went  
19      back to Carnegie Mellon.

20      Q.       Okay. And so in connection with that development  
21      effort for, what you described for Blue Pumpkin, did you  
22      manage that development effort?

23      A.       Yes, I managed the information gathering part of it,  
24      the design of the software itself, and I was sort of the  
25      main interface to the customers, to the contact centers.

Nourbakhsh - direct

1 Q. Okay.

2 A. So I was willing to fly out, talk to them, get to know  
3 them, understand their needs, et cetera.

4 Q. Okay. So I just want to talk a little bit more about  
5 your work. You mentioned understanding the need for the  
6 contact centers.

7 How did you seek, how did you do that?

8 A. I physically visited contact centers, everything from  
9 the San Francisco Chronicle Contact Center to a couple of  
10 contact centers in the Midwest that do -- they were like  
11 much newer. They were little startup airlines that we had  
12 in the early 2000s, to places like John Hancock, so major  
13 insurance companies.

14 I studied them by talking to the floor managers,  
15 talking to individual operators, talking to the Vice  
16 Presidents in the companies, and understanding what -- how  
17 were contact centers actually thinking about planning and  
18 dealing with incoming calls today and what's hard for them  
19 to do in terms of planning, staffing, and planning how to  
20 connect skilled staff.

21 That was right when skill-based scheduling had  
22 become a very hot topic, the idea that your contact center  
23 personnel don't all know the same things, and you need check  
24 fundamental new ways to connect people with different skills  
25 to the incoming calls. And as you see your needs, how can

Nourbakhsh - direct

1       you make sure you staff up so that no particular need is  
2       waiting too long.

3                       And so that's the kind of basic software  
4       problem we were trying to solve there.

5       Q.       Okay. And I just want to step back for a second.

6                       When did you start the project, what year for  
7       Blue Pumpkin, when you worked at Blue Pumpkin?

8       A.       Well, we founded Blue Pumpkin in something like 1996.

9       Q.       Okay.

10      A.       This particular major software effort I started in  
11      roughly 1999, and it went all the way through 2001/2002. My  
12      sabbatical was in there for about a year, inside of that  
13      quantum of time.

14      Q.       And did you continue on working with Blue Pumpkin for  
15      years after that as well?

16      A.       I did. A year-and-a-half or so later, after I went  
17      back to Carnegie Mellon, Blue Pumpkin was acquired by  
18      Witness Systems, and Witness Systems in turn made me chief  
19      scientist, or a similar title to that. And I worked with  
20      them on their IP technology, on their IP strategy.

21                       So one of the things were trade secrets one, of  
22      the things would be patents within Witness Systems, which  
23      also marketed a whole lot of systems to call centers.

24      Q.       Okay. And what year was that, that you were hired by  
25      Witness Systems when they took over Blue Pumpkin?

Nourbakhsh - direct

1 A. I was hired right as Blue Pumpkin was sold to Witness.  
2 I can't remember the year that was. I'm going to guess in  
3 the 2002/2003 time frame. I stayed with Witness for about  
4 two to three years.

5 Q. If you need to refresh your recollection by looking at  
6 the C.V., feel free to do so.

7 A. Sure. 2007. That means Witness was probably buying  
8 Blue Pumpkin around 2005, and I spent something like three  
9 years there playing the chief scientist role.

10 Q. So you were working in the industry from about,  
11 contact center industry from about what years to what  
12 years?

13 A. 1996 is when we started working in the industry, so  
14 '96 to 2007.

15 Q. Okay. Thank you. Sorry to go out of order here.

16 You were getting into before interviewing  
17 contact centers and various industries, I believe you  
18 mentioned insurance industry. What are some of the other  
19 industries that you had direct, directly interviewed  
20 people?

21 A. I think we did something with a casino because  
22 Las Vegas and Reno were not far away.

23 Q. All right.

24 A. We did software services. I don't remember if it was  
25 Microsoft or a competitor to Microsoft at that time. And,

Nourbakhsh - direct

1       yeah, we did insurance, for sure. We did airline flight  
2       scheduling, where you call to make a reservation.

3               And I can't remember the full breadth of  
4       industries. We ended up, I ended up personally visiting  
5       something like half a dozen, two-dozen contact centers  
6       repeatedly to really understand the process from their  
7       point of view, but then I would visit the vice president's  
8       offices to understand what makes them decide to buy  
9       software.

10              So what are the qualities that a piece of  
11       software has to have in the call center that is under  
12       there -- for them to feel it's worth their while to buy the  
13       software.

14       Q.     Okay. And so did you do any surveys of the contact  
15       center industry in connection with the development effort  
16       for Blue Pumpkin?

17       A.     Yes. I had been teaching about surveys at Carnegie  
18       Mellon, so it came sort of naturally, that when I went back,  
19       we did paper surveys and phone surveys with a number larger,  
20       so I went to the sales force at Blue Pumpkin and used them  
21       to introduce me to the contact centers that were already  
22       buying our software or that were potential leads. And I did  
23       phone surveys with a number of them. Then I followed up  
24       with paper surveys, and that's how we did the pricing  
25       surveys, the functionality surveys. You have them talk

Nourbakhsh - direct

1 about what are the functionalities they need most. You have  
2 them prioritize it on the list so you can understand what  
3 their view of value is or function.

4 Q. So in doing the functionality surveys, what knowledge  
5 did that give you about what was available in the industry  
6 during the time you worked for Blue Pumpkin?

7 A. Well, what we learned at the time, which was  
8 interesting, is that they were being very reactive. Contact  
9 centers were hiring and firing fast, depending.

10 So Macy's would hire a whole lot more people  
11 just in time for Christmas and Thanksgiving, and then they  
12 would fire them. It was very counterproductive. It was  
13 costing them more money than they were making.

14 They didn't know what to do to get call times  
15 down. What I mean is once somebody calls in, make them wait  
16 less time before they get to the answer they're looking for.  
17 That was a big source of concern and anxiety in the  
18 industry.

19 And so this idea of skill-based scheduling was  
20 tricky because they didn't know, well, if we have some  
21 operators who speak French and some who speak French and  
22 Spanish, and this one knows how to operate the center,  
23 and this one knows about software apps, how many each do  
24 we need at what time of the day, given the callings patterns  
25 of the people calling that have different inquiries coming

Nourbakhsh - direct

1 in.

2 There was a lot of anxiety back then around the  
3 question of multi-media. Should the software be a thin  
4 client? Should it be something that runs in the cloud  
5 somehow off of our computer? Should we be somehow using the  
6 cellphone that I have, should we be doing a chat with them  
7 or going right back to the telephone?

8 So there was underlying technological change we  
9 were seeing in our whole social world in terms of  
10 communication devices. And at the same time there was this  
11 question of skills and expertise and the idea you can't just  
12 hire a whole lot of people that have exactly the same set of  
13 skills. Obviously, this notion that I got back then made  
14 this case interesting because this is also about skills and  
15 expertise.

16 Q. And what did you do with the survey results after  
17 collecting them?

18 A. We used them to design the best software we could  
19 imagine offering, and then we designed the software and then  
20 we did actual, what do you call them, I forget the name for  
21 it, but we draw out pictures of the screens and show it to  
22 the potential customers, and say if we had a -- storyboards  
23 storyboards. That's what it's called.

24 So you show them like you would at a movie  
25 storyboards that would show frames, what it would look like

Nourbakhsh - direct

1 if you were using software and to solve your problem. That  
2 will help us understand in designing a piece of software  
3 that was useful for them.

4 We went down this question of seasonality. Can  
5 we help people understand the expertise, the kinds of  
6 employees they have in the contact center, and then hire  
7 that. And thinking about training and how you can hire  
8 people now that have a certain set of skills, but you can  
9 actually schedule each of their work schedules so that they  
10 that are going to gain what sort of skills they need by  
11 Christmastime.

12 You hire them by March, and by then you have the  
13 people you need, you bring them up from inside. They are  
14 not going to be hired and fired. They're going to be loyal  
15 members of the organization.

16 Q. In connection with that effort, you mentioned that in  
17 addition to interviewing and surveys, that you also had  
18 direct observation of the contact centers that you went and  
19 visited; is that right?

20 A. Right. As I said, I went to contact centers. I  
21 visited with them. I also go to sort of the CFOs and I  
22 visit offices to understand what their purchasing behavior  
23 is, what do they need to make a decision to buy our  
24 software.

25 Q. And did you gain personal knowledge of contact

Nourbakhsh - direct

1 center's functionality of the ones you visited?

2 A. Absolutely, yes. There's a huge diversity of contact  
3 centers, but I learned what makes them tick and I learned  
4 what is similar and what's diverse about them. So I learned  
5 what the key components of contact centers are that are more  
6 or less fixed across contact centers.

7 Q. And did you learn about the functionality that they  
8 had at the contact centers that you visited?

9 A. Yes. I learned specifically what they were and I was  
10 able to extract the contact centers that I wasn't visiting  
11 because I got enough of a sense to extrapolate the contact  
12 center industry in general.

13 Q. Now, even with respect to the contact centers you  
14 didn't visit, did you do surveys of other contact centers?

15 A. Yes. The telephone surveys we did were the biggest  
16 group. I probably telephone surveyed 50 contact centers  
17 just based on introductions from my sales team at Blue  
18 Pumpkin, and then a smaller group were paper surveys, and a  
19 smaller group were the ones I ended up visiting, and a  
20 smaller group were the ones we visited and installed  
21 software and followed up. Then we do pricing surveys with  
22 the software, a bigger group. It's kind of an hourglass  
23 shape.

24 Q. Did you attend any conferences related to the contact  
25 center industry?

Nourbakhsh - direct

1 A. Yes. Probably from '97 or '96 until 2003 or so I  
2 visited one or two major industrial conferences in the  
3 contact center software space in the U.S.

4 Q. And were there any -- were those -- you went to major  
5 ones. Is that what your testimony is?

6 A. Yes. We went to the biggest ones because that's where  
7 you see what your competitors are doing and that's where you  
8 get to talk to your future customers.

9 Q. Okay. And at the time you were working for Blue  
10 Pumpkin, did you review industry literature in connection  
11 with the development effort?

12 A. Sure. We did constant research. There was a standard  
13 set of journals and magazines in the contact center space  
14 and I kept abreast by reading them.

15 Q. What was your role with respect to the software  
16 engineering of the product that you, during the sabbatical  
17 that you took that you were working on?

18 A. My role was to manage that whole project, so the  
19 reason I went back to be able to do that while all the rest  
20 of Blue Pumpkin's managers kept doing what they were already  
21 doing.

22 So I did what you call the marketing  
23 requirements, documents, which sort of specifies exactly  
24 what the requirements are from marketing point of view that  
25 you need in the software, and then I wrote the product

Nourbakhsh - direct

1 requirements document, the functional document, that  
2 specifies functionally how is it going to work screen by  
3 screen, pull-down menu by pull-down menu item.

4 Then I put a team together and we did the  
5 architecture specification, which says what's the memory  
6 structure, what kind of databases are you going to be using,  
7 what are the different databases called, et cetera.

8 And then I worked with people that that worked  
9 hand in hand with me, the actual software developers, to  
10 make the software and to share code and debug it.

11 Q. Did you write any code?

12 A. Yes.

13 Q. Okay.

14 MR. SOBEL: May I approach the witness, your  
15 Honor?

16 THE COURT: Yes.

17 MR. SOBEL: Hand him a bottle of water.

18 THE WITNESS: Thank you. You read my mind.

19 BY MR. SOBEL:

20 Q. And who is in charge of Blue Pumpkin's intellectual  
21 property decisions?

22 A. Everyone at Blue Pumpkin is in charge, but I laid out  
23 a strategy for how we decide what to patent, how we deal  
24 with disclosures inside the company, and how we decide what  
25 makes it on the patent side and what remains as a trade

Nourbakhsh - direct

1 secret.

2 Q. All right.

3 A. So I started that process. I also did that kind of  
4 strategy for Witness Systems following its acquisition.

5 Q. Okay. As part of your work in this case, were you  
6 asked to perform an analysis of XpertUniverse's trade  
7 secrets and whether they qualified as a trade secret?

8 A. Yes. That was one of the things I did for this case,  
9 correct.

10 Q. And the definition for your use of -- for what a trade  
11 secret is, is that the one in your report at paragraph 30?

12 A. Yes.

13 Q. Okay.

14 A. That's correct.

15 Q. And can you tell me how much knowledge and experience  
16 that you gained while at Blue Pumpkin later, whether it  
17 formed your opinions as to whether or not XpertUniverse's  
18 trade secrets qualified as trade secrets?

19 A. The experience that I had before is in such a nearly  
20 identical area of inquiry, which has to do with how contact  
21 centers think about inquiries and dealing with inquiries and  
22 what kind of software they have available to them, the  
23 closest software available, that that knowledge allows me to  
24 understand, once I understand what the trade secrets are,  
25 whether they're novel, whether they are something that

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1        simply didn't exist at the time. Were there competing  
2        products that had it or was it just a nonexistent feature  
3        idea?

4                    Whether they are of value, that is to say, if I  
5        were to do an imaginary new survey with those folks that I  
6        talked to at the CFO and VP offices, when I describe the  
7        feature that this provides and explain how this would provide  
8        ROI, they say, okay. Here's my credit card. I want to buy  
9        that.

10                   And so my experience really allows me to  
11        understand what is it that's special about the trade  
12        secrets, if anything, and is the thing special about it  
13        something that truly wasn't available at the time and the  
14        real value in the industry if it had been available at the  
15        time.

16        Q.        Did your experience at Blue Pumpkin also inform you as  
17        to what was generally known in the industry during that time  
18        frame?

19        A.        That's right. We spoke to many companies and  
20        collaborated with many contact centers and the folks that  
21        were in charge of contact centers of major organizations.

22                   So I understood what was available. I  
23        understood the space of possibilities and so I can judge  
24        this against the space of possibilities that I knew at that  
25        point in time.

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1 Q. All right. And how does that time period relate to  
2 the time period that was relevant to XpertUniverse?

3 A. From the discussions that I've had and from what I  
4 understand to be the dates of the interactions between XU  
5 and Cisco, it actually works pretty well. The knowledge  
6 that I have for the very early 2000s ends up to mesh with  
7 exactly the point in time where we're talking about this  
8 question of whether these trade secrets had real value at  
9 that point in time and that contact space.

10 So I think the dates sort of -- well, not  
11 luck, you guys looked for an expert that would have the  
12 right dates in their entire history. But they line up  
13 well.

14 Q. And so I guess the gist of what you are saying, you  
15 were able to determine how the trade secrets were different  
16 from then what was generally known; is that right?

17 A. That's correct. I'm able to make that determination,  
18 which allows me to write my reports. And I'm able to  
19 elucidate on that verbally and explain what was going on  
20 back then is different from what the cases offers and the  
21 patents offer.

22 Q. So in addition to your expertise, you're also basing  
23 your opinion on the personal knowledge and experience that  
24 you gained to determine whether XpertUniverse's trade  
25 secrets qualified as trade secrets. Is that what you are

1 saying?

2 A. Yes. My opinions are, my opinions are fed by my  
3 rational expertise in the sense of taking the documents in  
4 front of me and assessing them as a logical person that has  
5 background, but they -- opinions also are formulated from my  
6 recollection, expertise of what was going on in the industry  
7 at that point in time.

8 So those two things together, sort of rational  
9 decision-making plus actual experience, that's what makes me  
10 confident of the opinions that I have.

11 Q. Just to be clear, when you say rational  
12 decision-making, you mean with rational decision-making  
13 in -- with the experience that you have? Is that what you  
14 are saying?

15 A. Yes, with the technical knowledge I have.

16 Q. Okay.

17 A. My job requires the technical analysis, but also  
18 recollection what was happening at that point in time and to  
19 bridge those two kinds of knowledge together.

20 Q. All right. So let's get to the trade secrets. You  
21 were asked -- were you given a list of XpertUniverse's trade  
22 secrets?

23 A. I was.

24 Q. And who gave you that list?

25 A. Counsel gave me the list originally.

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1 Q. All right. Let me mark for the record Plaintiff's  
2 Exhibit Daubert 4.

3 May I approach?

4 THE COURT: Yes.

5 (Plaintiff's Daubert Exhibit No. 4 was marked  
6 for identification.)

7 THE COURT: Why don't you keep the original.

8 MR. SOBEL: Approach the witness?

9 THE COURT: All right. Right. So this will be  
10 admitted.

11 (Plaintiff's Daubert Exhibit No. 4 was admitted  
12 into evidence.)

13 THE COURT: It is the second response to  
14 Interrogatory No. 12.

15 (Mr. Sobel handed the exhibit to the witness.)

16 BY MR. SOBEL:

17 Q. Was this the list of trade secrets that you evaluated,  
18 Dr. Nourbakhsh?

19 A. Yes, this is the list that I evaluated.

20 Q. Okay. At a high level, you're offering opinions  
21 regarding these trade secrets?

22 A. Yes, I am.

23 Q. Okay. At a high level, what are those opinions?

24 A. It's the diversity of trade secrets. At a high level,  
25 my opinion is the trade secrets, once I come to understand

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1       them, are both not obvious, didn't exist in that time frame,  
2       and have real economic value.

3       Q.     All right. And how about with respect to whether  
4       Cisco used the trade secrets? Are you offering an opinion  
5       on that?

6       A.     Yes, I'm offering an opinion on that, too.

7       Q.     Okay. And how about whether Cisco disclosed certain  
8       of the trade secrets in certain patent applications? Are  
9       you offering an opinion on that?

10      A.     Yes. I can't remember the number offhand, it's in  
11      my report, but for a patent, and also for patent  
12      applications from Cisco, I read those, whether they have  
13      trade secrets, and I identified specific trade seek results  
14      through that.

15      Q.     Okay. So let's talk about the first part. How do you  
16      determine that the 46 -- well, just for the record, the 46  
17      on Exhibit 4; is that right?

18      A.     Yes.

19      Q.     Okay. How did you determine for the record that the  
20      46 trade secrets were actually trade secrets once you  
21      received the list? What did you do first?

22      A.     The first thing I did is to read the list. The second  
23      thing I did was to talk to, I believe it was John Steinhoff  
24      and Victor Friedman, to ask questions I have about the trade  
25      secrets and make sure I understand exactly what they mean by

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1 the trade secrets.

2 In talking to them, in reading the list and then  
3 in thinking about the trade secrets, I came to an  
4 understanding of what they represent, what each trade secret  
5 means in terms of its core functionality, if it's special,  
6 and then I was able to take that, what I considered the  
7 special core functionality and compare that to what I  
8 remembered in the industry in the early 2000s.

9 Q. All right. And did you, from reading the list, did  
10 you understand, did you understand what the trade secrets  
11 are, are alleged, were alleged to be?

12 A. Yes. I have a reasonable formulation for every trade  
13 secret in the list, yes.

14 Q. Okay. Now, in determining whether each of those trade  
15 secrets were, is your opinion, qualify as trade secrets, did  
16 you seek to determine whether they were generally known to  
17 the public or the contact center industry?

18 A. Yes. Once I understood what the trade secret  
19 embodied, what each one embodied, the next question I asked  
20 had to do with whether they were novel and unknown at the  
21 time. And that's something that I looked at trade secret by  
22 trade secret, again, accessing my memory about what I know  
23 about the contact center in that time period.

24 Q. Okay. And --

25 THE COURT: Actually, Doctor, when you say

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1 "unknown at the time," what time are you talking about?

2 THE WITNESS: Roughly, 2000 until 2006.

3 BY MR. SOBEL:

4 Q. And how did you make that determination about whether  
5 it was available in the industry at the time?

6 A. I used my prior experiences in the industry. I  
7 essentially had to enter a time machine, think about what  
8 existed, all the software that I knew was being used in  
9 contact centers, the functionality the software had and  
10 whether the functionality is being prescribed in the trade  
11 secrets is functionality that existed or didn't exist.

12 Q. Okay. Just so the record is clear, when you say "time  
13 machine," you are using the phrase --

14 A. It's a metaphor.

15 Q. Okay. I want to make sure the record is clear. All  
16 right.

17 MR. SOBEL: All right. Let me introduce -- I  
18 will mark for the record Plaintiff's Daubert Hearing 5, 6  
19 and 7. No. 5 is U.S. Patent 7,366,709.

20 No. 6 is U.S. Patent 7,499,903.

21 And No. 7 is U.S. Patent Application, it's  
22 Publication No. 2002/0013836.

23 THE COURT: Yes.

24 And for the purposes of this hearing, they're  
25 admitted.

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1 (Plaintiff's Daubert Hearing Exhibit No. 5, 6  
2 and 7 were marked for identification.)

3 (Mr. Sobel handed exhibits to the Court and to  
4 the witness.)

5 BY MR. SOBEL:

6 Q. Did you review XpertUniverse's patents and patent  
7 applications to determine whether they published any of  
8 their trade secrets in them?

9 A. Yes.

10 Q. Okay. And the exhibits you have before you, 5, 6 and  
11 7, are those the patent and patent applications of  
12 XpertUniverse that you reviewed?

13 A. Yes.

14 Q. All right. Okay. And you said that you determined  
15 each of those trade secrets had value. Did you seek to  
16 determine whether they had economic value?

17 A. Yes. Did I seek to determine if they had economic  
18 value? Yes. In thinking about contact centers at the time,  
19 the question that was fundamental to whether the trade  
20 secret has inherent value was whether, if the trade secret's  
21 knowledge had been put in software, that software would in  
22 return have a real ROI for the contact center or the  
23 organization that houses the contact center.

24 Q. Okay. I'm sorry. I just want to get back, make sure  
25 something was clear in the record.

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1                   Now, you reviewed the Exhibits 5, 6 and 7. And  
2                   what is your opinion as to whether any of the trade secrets  
3                   on Exhibit 4 were disclosed in the, those exhibits which  
4                   were the XU patents and the patent application?

5           A.       My opinion is the trade secrets were not disclosed  
6                   by -- by Exhibits 5, 6 and 7, no.

7           Q.       Okay. All right. Did you look at any third-party  
8                   technology not of Cisco or not of XpertUniverse and  
9                   determine whether -- in forming your opinions concerning  
10                  trade secrets?

11          A.       Yes. I looked at the technology for the sake of trade  
12                  secrets and patents, but as described in my expert report, I  
13                  looked at, I believe it's called Expert Contact by Genesys.  
14                  I looked at K-World by KPMG. And those are two examples of  
15                  technology I looked at just to understand what was attempted  
16                  at the same general point in time.

17          Q.       Okay. And why did you -- how did -- why did you  
18                  choose to take a look at Expert Contact by Genesys?

19          A.       Well, Genesys is a major company that we knew all  
20                  about back then. Deposition, or maybe it was called  
21                  testimony of Richard Barton, I believe it was, was made  
22                  available to me. And so in reading that, I got to know a  
23                  lot of contact. And he was I believe in charge of Expert  
24                  Contact's end of life period. So he was able to be very  
25                  forthright about what its shortcomings were. A very useful

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1 thing.

2 Q. And how did that analysis inform your opinions  
3 regarding value of the trade secrets?

4 A. It reinforced the fact that I believe there was need  
5 in the contact center space for software that made it easier  
6 for seekers to be able to get to experts. But it also  
7 reinforced to me that the particular innovations of the  
8 trade secrets as I understand the trade secret documents  
9 were not implemented in the Expert Contact software.

10 Q. Okay. And you mentioned K-WORLD by KPMG, I believe.  
11 Why did you choose to look at that?

12 A. Mike Cirillo was made available to me for an  
13 interview, so that I could at length talk to him. And he  
14 was a gentleman who was, I think, called chief knowledge  
15 officer at KPMG.

16 KPMG was a very major corporation back then, and  
17 so to me it was really interesting to see how they were  
18 trying to develop ontologies that made it easier to connect  
19 to expert organization across through sub organizational  
20 boundaries. So to me that was really a great example  
21 of a contemporaneous attempt to solve the same kind of  
22 problems that I believe XU has very good solutions for.

23 Q. And how did, in analyzing the K-World product, how did  
24 that inform your opinions regarding the trade secrets?

25 A. Well, it made it clear to me that the trade secrets

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1 have value because numerous times in our conversation,  
2 Mr. Cirillo talked about the functionality that he needed.  
3 For instance, to deal with presence indication correctly and  
4 to be able to channel calls to the expert properly, to be  
5 able to more automatically create -- that he was able to do.

6 And in each of those cases I was available to  
7 see that there were trade secrets that were actually  
8 directly talking about the issues that he lacked in his  
9 attempts to innovate with K-World.

10 Q. And so was K-World a software, was it an attempt to  
11 find correct expertise in connecting the seekers are  
12 experts?

13 A. Yes. K-World was sort of an intracompany attempt to  
14 make sure that all the expertise across KPMG's large  
15 offices, something like 100 or 180 offices are able to reach  
16 expertise anywhere else, which is largely the same problem  
17 as any seeker trying to reach expertise.

18 Q. The basic need at K-World was attempting to address,  
19 is that the same basic need that the Cisco's Expert Advisor,  
20 expert on other products were attempting to address?

21 A. Well, it depends. At some level, yes, they're all the  
22 same in the sense they are trying to connect seekers to  
23 experts. K-World was trying to do it within one large  
24 organization. It has lots of sub-organizational boundaries  
25 and differences in language.

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1                   With Expert Advisor and with Expert, I would say  
2           it was more about connecting seekers from the outside who  
3           were customers, let's say, to a Macy's or a bank, and  
4           connecting those customers to expertise within an  
5           organization.

6           Q.     And do you have an opinion about whether or not the  
7           trade secrets of XpertUniverse were subject to reasonable  
8           efforts to maintain secrecy?

9           A.     I do have an opinion about that, yes.

10          Q.     Okay. And what's your opinion?

11          A.     My opinion is that XpertUniverse exerted reasonable  
12          efforts to maintain secrecy in that I reviewed the NDA that  
13          XpertUniverse and Cisco signed, which is very similar to the  
14          standard practices that we at Blue Pumpkin would have with  
15          all of our partners as well.

16          Q.     And did you speak to XU about its practices of sharing  
17          information with third parties besides Cisco?

18          A.     Yes. I asked XU about whether they had everybody  
19          sign the NDA to who they exposed trade secrets, and they  
20          said, yes, they had everybody sign the NDA. We had talked  
21          about -- which, again, it is similar to what we would have  
22          done at Blue Pumpkin as well.

23          Q.     In the contact center industry, it's your opinion  
24          that's a reasonable effort to maintain secrecy?

25          A.     Yes. I think in the software industry in general, but

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1       certainly in the contact center industry, that's what we  
2       did. That's what our partners did with us what we would go  
3       and talk with other partners. That's the general behavior  
4       that we saw. You talk about the fact that you're going to  
5       have an NDA and you sign a document and then you move  
6       forward with the understanding that you are now protecting  
7       each other's rights.

8       Q.     Okay. You said that's what you did before. You mean  
9       what you did in connection with your work in trying to  
10      protect Blue Pumpkin's intellectual property?

11     A.     That's correct.

12     Q.     Okay. And when you're at Blue Pumpkin, did you think  
13      that was a reasonable step to protect the secrecy of Blue  
14      Pumpkin's information?

15     A.     Absolutely. You have to trust your partners. You  
16      have to have a formality that lets you put that trust in  
17      place, and you have to trust your partner beyond that so you  
18      could do good work together. And that's exactly what we did  
19      and it's commonplace in the industry.

20     Q.     Okay. And you've signed an NDA before?

21     A.     Yes.

22     Q.     For yourself, personally?

23     A.     Yes.

24     Q.     And you took those confidentiality obligations  
25      seriously?

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1 A. Absolutely, I did.

2 Q. All right. And did you keep the information that you  
3 promised to keep secret a secret?

4 A. Yes, I did.

5 Q. All right. And you knew you were obliged by those  
6 obligations not to disclose the information?

7 A. That's correct.

8 Q. Okay. So in your experience in the context under  
9 industry, when someone enters into an DA with another party,  
10 it's reasonable to expect the information you shared will be  
11 kept secret?

12 A. Oh, that's the whole point, yes.

13 Q. All right. I want to walk you -- well, actually,  
14 before I get into some of the specific trade secrets, could  
15 you tell the Court with respect to all the trade secrets,  
16 why is this all important? Can you give us -- put it  
17 together for us?

18 A. Sure. So one way to think about this is what do the  
19 trade secrets provide and with what do the patents provide,  
20 and each one provides a different sort of thing. It's  
21 clever in a way.

22 The patents provide a very sophisticated  
23 taxonomy, kind of knowledge structure for how you maintain  
24 information about expertise in a way that is portable. So  
25 you can swap in and out new kinds of experts who have

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1 skills, but by foundationing it all, having a concrete  
2 foundation basically of underlying criteria.

3 So patents on one side give you this really good  
4 knowledge structure, the '903 patent. You would access the  
5 knowledge structure. How do I access categories in  
6 interactive ways? So that's where the patents are strong.  
7 They're about ontology knowledge and making knowledge  
8 flexible. That's important, by the way, because if you are  
9 going to blow out of a contact center into experts that are  
10 not in the contact center, you're going to deal with  
11 organizational boundaries in the company. And the problem  
12 is they're going to have different languages, they're going  
13 to have information issues with some people some of the tie  
14 and they have other jobs.

15 And so you have to be able to cross a whole lot  
16 of barriers and challenges that you never would have to deal  
17 with originally when you just are a contact center. So  
18 that's the patent side.

19 The trade secret side is interesting because  
20 it's a number of techniques. When you decide that you are  
21 going to take that seeker's call in, the question that they  
22 have and connect it to an expert anywhere in the company and  
23 make that as flexible as possible, you run into a bunch of  
24 different instances of headwind and, to me, the trade  
25 secrets are interesting because they deal with lots of

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1 different aspects of headwind.

2 One piece of headwind is using a metaphor  
3 like a time machine, but one piece of headwind is the  
4 question of these guys have full-time jobs. How do I  
5 motivate them to actually care to answer the call? And  
6 that's what one or two of the trade secrets is about.

7 One of them is how do I deal with present  
8 information when they are not locked into the contact center  
9 system, so how do I do presence any way?

10 Another headwind is, how do I take these people  
11 who are outside the contact center and come up with simple  
12 taxonomies that will allow them to patch into it without  
13 going to necessarily the extreme effort that you would  
14 take to create one consistent taxonomy inside the contact  
15 center.

16 There are many of these. The point to me in my  
17 eye when I look at the trade secrets is each of them solves  
18 a little problem that you are going to have. It's kind of a  
19 big problem, but each of them makes it easier to lubricate  
20 this process of getting from the seeker to an expert outside  
21 the contact center.

22 So that means to me that the trade secrets on  
23 the one hand and the patent on the other hand, neither one  
24 needs the other one, but if you have them both, it's  
25 certainly a better organizational system than if you had

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1       only one and not the other. But neither one really depends  
2       on the other one. And I think I started to ramble some. I  
3       will stop now.

4       Q.       That's okay.

5               So I gather what you are saying is that the  
6       trade secrets, there are problems or hurdles that have to  
7       be overcome in deciding a collaboration system; is that  
8       right?

9       A.       That's right. So I will give you another example  
10      that's kind of interesting. If you are going to deal with  
11      experts that are outside the contact center, you have to  
12      make profiles for them, but you might suddenly be importing  
13      thousands of experts and the normal techniques to use in a  
14      contact center to create a database is a waste of time. You  
15      just think databases in the company as a whole already have  
16      a lot of information about their expertise and their  
17      expertise can change over time and those existing databases  
18      might track that.

19             So one or two of the trade secrets is about this  
20      issue of how you import data or have a processing system  
21      that imports the data properly so that you can scale up and  
22      bring all these big experts in without just retyping it all  
23      the way you would inside the contact center. So that's a  
24      tool, right? It's a tool that makes it easier to imagine  
25      authentically connecting to experts inside the company

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1       rather than just staying on your wall garden of the contact  
2       center.

3       Q.       What has changed now for present day in viewing these  
4       trade secrets that might have someone view differently from,  
5       you know, the time period of early to mid-2000s?

6       A.       Well, we're much more sophisticated about databases.  
7       We're much more sophisticated about data mining. There are  
8       a ton of ideas in the trade secrets that are pioneering in  
9       that time frame because you didn't have proper cross-  
10      organizational databases that had common languages, so  
11      that's why you would need taxonomy.

12               We didn't have really good days back then to do  
13      data mining and understand how, by looking at messages, we  
14      can start to understand expertise of the people behind the  
15      messages.

16               What has changed is software is becoming  
17      much more, not just ubiquitous, but ubiquitous in an  
18      enterprise-wide sense than it was then. The contact center,  
19      you've got to remember, was a walled garden. It was a place  
20      where you had contact center software, you would put it just  
21      there.

22               And so it was sort of verboten to imagine  
23      the idea you are going to take this contact center software  
24      and reach out to people outside the contact center. The  
25      contact center wanted to own their people. Even when we

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1        tried to schedule training sections, we got huge pushback  
2        from the managers at the contact center. They didn't want  
3        to give up their guy for training even though that would  
4        make him more able to deal with inquiries coming in.

5                    So it wasn't exactly the dark ages, but it's  
6        hard to use today's mindset and understand how very  
7        different the world was back then in terms of software that  
8        was cross enterprise and ontologically very, very flexible  
9        so you could deal with lots of knowledge all the time.

10       Q.        Let me go into a couple. Let's go into a couple  
11       specific trade secrets so we can, you know, explain what  
12       they are.

13                    If you have, I believe it's Exhibit 4, that's  
14       the list of trade secrets in front of you?

15       A.        Yes.

16       Q.        If you could turn to No. 45. And perhaps you  
17       can just explain what it is and what the problem is it  
18       solves.

19       A.        It's an interesting one because it's, again, problem  
20       solving on the issue that the expert is not a full-time call  
21       answerer or contact answerer in the contact center.

22                    So trade secret 45 opens up this whole idea  
23       that, first of all, you're going to have some way of  
24       identifying lots of information and its relevance to the  
25       business problem. In this case, it mentions things like

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1 provisions and business rules.

2 But, second, and I think if you kind of jump  
3 down to sections 7 and 8, it does something really, really  
4 smart that we weren't doing back then at Blue Pumpkin, we  
5 weren't thinking about back then, which is, if you are going  
6 to reach out to these experts that outside the contact  
7 center, you can't assume they're just going to take the  
8 call, and you can't just use monetary compensation to do it.  
9 What you want to do is make sure that they have access to a  
10 software system, the information that connects to them, so  
11 that when the seeker's inquiry comes in, they can learn so  
12 much about the situation that they can in realtime make a  
13 decision about whether their expertise is appropriate and  
14 whether it's good for the company, whether they'll volunteer  
15 to take the call.

16 So steps 7 and 8, once you've done the clearly  
17 required things about identifying an expert are doing  
18 something novel, which is reaching out, providing  
19 information outside the walls of the contact center and then  
20 asking directly, do you want to take the call, are you able  
21 to take the call right now, getting an answer and having the  
22 logic to deal with that properly, whether they say yes or  
23 no.

24 Q. And could you tell us a little bit about, turn to  
25 No. 16. Take a look at that and review it and then let us

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1 know.

2 A. Let me read it first.

3 (Pause while witness reviewed exhibit.)

4 THE WITNESS: Yes. 16 makes a really good point  
5 about the fact that this is not about knowledge management.  
6 We had some companies back then that were just starting to  
7 deal with knowledge management, trying to take all the  
8 knowledge of the company and put it in one common database,  
9 and they were having a lot of trouble because they were  
10 going to, they were attempting to unify all the information  
11 in a way that's archival, capture the knowledge and  
12 information so, for example, when somebody leaves, it's  
13 still got the knowledge.

14 What 16 said is interesting because it's saying  
15 the taxonomy you're trying to create for this seeker expert  
16 connection that goes beyond the contact center isn't the  
17 same as that standard knowledge management technique we were  
18 trying in the early 2000s to archive information about the  
19 company. Instead, what we've got to do is understand what  
20 are the areas in terms of inquiry that are going to come in  
21 that we have to route out to the experts.

22 So in a sense it said there's a simpler  
23 version of taxonomy we can do than full-blown knowledge  
24 management systems that lack to solve the problem.

25 Q. And if you can take a look at the next one, No. 17 --

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1 A. Yes.

2 Q. -- on the trade secret list, group 4, and take a read  
3 over that.

4 A. Same thing?

5 Q. And explain what that is.

6 (Pause while witness reviewed exhibit.)

7 THE WITNESS: 17 is identifying the fact that  
8 once you have a taxonomy, once you have the thing that we  
9 just talked about from No. 16, you also have to have some  
10 kind of interactive interface that lets you allow the  
11 selections in realtime to get to the point where you have a  
12 narrow enough identification of the inquiry type that you  
13 have to be able to farm it out in order to determine what  
14 expert can deal with it.

15 It's an absolutely necessary functionality no  
16 matter how you're going to read out the contact center, in  
17 my opinion. And that kind of interactive interface that  
18 narrows the possibilities down specifically so you can  
19 reach experts outside the contact center from the seekers  
20 point of view, that's something from that point in time was  
21 novel.

22 Q. And if you can turn to number 37, and I think it's on  
23 page 12 of the list. And if you can take a look over that  
24 and explain what that is, the problem it solves.

25 A. Let me read it. Now I've got it.

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1 (Pause while witness reviewed exhibit.)

2 THE WITNESS: So telepresence was very new in  
3 the early 2000s. The idea that you can connect people and  
4 really make video conferencing work was new.

5 AT&T had tried some experiments with video  
6 phones that had been a disaster in the early eighties and  
7 nineties. It started to catch up because bandwidth caught  
8 up.

9 The interesting point was telepresence was  
10 really point to point. The idea is you know who you want to  
11 contact. You dial in their unique I.D. in some fashion and  
12 you contact them. What it wasn't about, and that's what  
13 this allows you to do, is to hijack that existing  
14 technology of telepresence and say we can do something  
15 better with telepresence. We can take telepresence and  
16 combine it with the correct ontology and interactive  
17 foundation system. And now you are not going to reach the  
18 one person you know you can reach, like a videophone chat.  
19 Instead, you're going to use telepresence as a vehicle for  
20 communication, but who you are communicating with is going  
21 to get decided by the other trade secrets.

22 So to me what is interesting about 37 is they're  
23 saying, here's a novel way of combining this new idea which  
24 is breaking out the contact centers with another new idea  
25 that's already out in the marketplace. It's right there to

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1 wait for being conjoined to it. That's an example  
2 specifically of telepresence, which is the example that's  
3 given here. But that to me provides particular power for  
4 Cisco, because they were in a space where telepresence was  
5 so important and something they could offer as a high value  
6 product.

7 Q. And trade secret No. 6. We'll do two more. If you  
8 can look at --

9 A. You are not doing these in order, are you?

10 Q. Sorry.

11 A. That's okay.

12 Q. Page 3. If you can take a look at that and explain  
13 what it is and the problem that it will overcome in the  
14 contact center space.

15 (Pause while witness reviewed exhibit.)

16 THE WITNESS: Yes. We talked a little bit about  
17 this with another trade secret, but here we're saying,  
18 again, thinking through the details, if you are actually  
19 going to have experts out at the contact centers deal with  
20 these calls, they have to be able to refuse the request, but  
21 to refuse the request, they have to have some kind of prior  
22 knowledge of their schedule and they have to have  
23 information about the request so they can decide when it's  
24 appropriate to refuse and when it isn't.

25 It really has another interesting idea, which is

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1 the managers should also be able to veto. So it makes sense  
2 for managers to also have control over the expert's  
3 willingness to provide help or not at certain points in  
4 time.

5 And it talked about control over ability of  
6 reporting. To me, control over availability of reporting  
7 is very important both from the manager's point of view and  
8 from that expert's point of view, because it makes it more  
9 feasible to imagine opening up the floodgates and letting  
10 the experts receive some of the calls.

11 Q. Just finally, one more. It's a longer one, but on  
12 page 10 starts trade secret 36.

13 What can you tell us about that one and what the  
14 problem it solves? Tell us what it is.

15 A. Give me a second to read it, please.

16 Q. Sure.

17 (Pause while witness reviewed exhibit.)

18 THE WITNESS: So to understand this trade  
19 secret, I'm going to respond to the first part first.

20 I actually talked to folks at XU to understand  
21 this process they went through in terms of verticals.

22 The issue is reaching experts throughout,  
23 breaking out of the context reaching experts throughout the  
24 organization are especially useful in certain organizations.  
25 I think this became apparent to XU early on because they

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1 decided, where should we apply this? There's certain places  
2 where it's no-brainers where it has technical value if you  
3 can get the detail right. One of those, for example, is  
4 retail. So the idea when you are shopping for anything, you  
5 can reach experts who can convince you that you are shopping  
6 for the right thing, you should buy it, is very clinical for  
7 the organization.

8 Another example is banking, as they pointed out  
9 as well, because there are so many different services that  
10 banks offer and it's hard to staff a bank up to have all of  
11 those people representing those services in-house.

12 The last thing you want to do is lose a  
13 potential customer because they're going to switch to  
14 another bank because they can't get access to the  
15 information they need right away.

16 So you can cut your costs if you can reach those  
17 experts wherever they are. The beginning part is all this  
18 about this issue of identifying verticals and understanding  
19 how this is particularly useful for the verticals.

20 Q. Now, after you have an understanding of the trade  
21 secrets, you said you formed opinions as to whether Cisco  
22 used the trade secrets; is that right?

23 A. I didn't form that opinion until after I read all the  
24 Cisco documentation.

25 Q. Just so it's clear for the Court, when you use the

1 word "map" in your report, what did you mean?

2 A. The word "map" is a computational term that I use.

3 One of the ways that I want to understand usage of the trade  
4 secrets is to see, is a product that Cisco has, when I  
5 evaluate the product with the architectural diagram, the  
6 code, the user's manual, the demonstration guide, is it  
7 doing absolutely everything the trade secret says?

8 The word "map" means is it computationally  
9 identical? So is it the case that the functionality that's  
10 key in the trade secret is exactly being used in the  
11 product? So when I use the word "map," what I mean is, is  
12 that trade secret in use in the product? And I do it from a  
13 computational point of view because I'm looking at this  
14 technically. That's my job.

15 Q. All right. And how did you go about determining  
16 whether Cisco used the trade secrets? What did you do?

17 A. Well, I did the same thing for the trade secrets and  
18 the patents in terms of my process. And what I mean by  
19 process is, let's see. I started by going to the law firm  
20 that hired me, Stroock, and we have an extremely large  
21 number of boxes with everything that Cisco had sent over.  
22 This is a multi-path process.

23 The first thing I did, I went through every  
24 single piece of paper Cisco had sent over, paper by paper,  
25 making the decision as to whether it's relevant or not. I

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1        had already read the patents carefully. I already read the  
2        trade secrets. I talked to the XU folks so I could  
3        understand them.

4                    I went through this very, very large amount of  
5        paper to understand what is each piece of paper that's  
6        actually relevant to this. We took every relevant piece of  
7        paper that I ended up with and shipped them all to  
8        Pittsburgh, Pennsylvania, where I live, and then I did a  
9        two-pass thing with those, which is basically took a pen out  
10      and read through all of those one by one and read through  
11      every piece of what I had determined that was probably  
12      relevant to determine if it is definitely relevant. If it  
13      is, I circled things, whether it's the architectural  
14      diagrams or in the source code or in the users's manuals.  
15      And I literally marked up those physical documents and  
16      marked them up by referencing and cross-indexing to trade  
17      secrets in patents that I thought they were relevant for.

18                   I did that for all those documents. Then I went  
19      back to the beginning again, opened my computer and did it  
20      again, but this time I did a giant Excel sheet that  
21      cross-indexed for me every Bates number, and for every Bates  
22      number, every patent or trade secret, and for each patent,  
23      every sub-element of each element of each claim that I felt  
24      was directly relevant to what I was reading in the Cisco  
25      documents.

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1                   So it takes multiple passes like that because  
2           I'm forming for each product that Cisco has an understanding  
3           of how the product works in my head from this jigsaw puzzle  
4           of pieces. I've got the configuration I've got in front of  
5           me. I've got the marketing requirements documents from  
6           Cisco. I've got slide sets that they used internally to try  
7           and convince folks to sell the product.

8                   It's by looking at all of those and taking bits  
9           and pieces from each one that's relevant that you make a  
10          coherent picture.

11                  So I did that Excel sheet for all of these  
12          products and trade secrets, and that's why you'll find Excel  
13          charts in my first report. Those are literally snippets of  
14          my master Excel sheet for each product, for each claim and  
15          each trade secret. Those aren't exhaustive because as I  
16          wrote the report, I found more evidence, but they are good  
17          additional documents that show you the diversity of sources  
18          that I used in trying to justify my opinion.

19                  MR. SOBEL: Your Honor, I would like to walk  
20          through an example of, you know, some of the documents he  
21          used to demonstrate his methodology for showing that the, as  
22          to why one of the trade secrets was used in connection with  
23          a Cisco product. I just need some time to enter these  
24          documents in.

25                  These first set of documents are the ones he

1       relied on for Expert Advisor.

2                   THE COURT:   How much more time do you expect to  
3       use altogether?

4                   MR. SOBEL:   Well, I planned ongoing through an  
5       example of that trade secret and then showing also how he  
6       used the same process for at least one other product and  
7       then to establish his methodology for how he arrived at his  
8       opinions.

9                   THE COURT:   And that's how long?

10                  MR. SOBEL:   Probably a half-an-hour it will  
11       take.

12                  THE COURT:   I'm sorry.   What you want to go  
13       through is to show, in regards to the trade secrets, the  
14       things you say you want to do next, what is it you want to  
15       show?

16                  MR. SOBEL:   Well, his methodology for his -- for  
17       arriving at the opinion that Cisco used a trade secret in  
18       connection with a product offering.

19                  THE COURT:   In other words, sort of a mapping  
20       thing?

21                  MR. SOBEL:   Yes.   Yes.   Yes.

22                  THE COURT:   No, I'm just not sure if that's the  
23       best use of your time.   I mean, the briefing is going to  
24       identify the certain number of issues.

25                  I think I understand what he has just said,

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1       which I thought I understood actually before he just said  
2       it, which is that he had something in the world, 146, and  
3       he's looking at a Cisco product and he sees what he says is  
4       computationally, which I take to mean more or less the same  
5       thing in Cisco products.

6                     Is that what you mean by map?

7                     THE WITNESS: That's right.

8                     THE COURT: So I've got that.

9                     What is it now? What I'm trying to figure out  
10       is what is it you want to show me in addition to that?

11                    MR. SOBEL: Well, you know, essentially  
12       demonstrate, you know, where he found instead of just walk  
13       through one example of, you know, some of the --

14                    THE COURT: All right: If you think it's  
15       important, go ahead and do it.

16                    MR. SOBEL: My understanding, your Honor, is  
17       we're here for his qualifications.

18                    THE COURT: Yes. I thought the qualifications  
19       were pretty much not really at issue.

20                    MR. SOBEL: Well, the only point on the  
21       qualifications is that, you know, under Kumho following  
22       Daubert, the case law and its progeny supports that in  
23       certain cases, an expert's personal knowledge and experience  
24       can be an indicia of his reliability in the case.

25                    THE COURT: Well, I wouldn't say it exactly like

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1       that, but, yes, he can have knowledge as to something other  
2       than the total academic field in which he teaches.

3               MR. SOBEL: I'm suggesting that his personal  
4       knowledge and observations is indicia of reliability in this  
5       case because the methodology requires someone who was, had  
6       knowledge at a certain time and comparing the trade secrets  
7       in that context letter.

8               And under Kumho, you know, there's no set, you  
9       know, set of factors for assessing the reliability and  
10      methodology, and I believe that and its progeny supports  
11      that in certain cases, and I think this is the perfect  
12      appropriate case, the personal knowledge and experience of  
13      the expert is important and is a factor in determining the  
14      reliability of methodology.

15              THE COURT: All right. Like I said, it's your  
16      time.

17              MR. SOBEL: All right. But as far as the --  
18      okay. I mean, Cisco raised some issues in their briefing  
19      and, you know, after looking at it carefully, most of the  
20      issues that they seem to be raising or criticisms go to,  
21      in my mind -- they are fair points for cross-examination,  
22      but --

23              THE COURT: I've read the briefs. Do you  
24      want to ask him some questions about them or are you saying  
25      you don't think you need to ask him any questions about

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1       them?

2                   MR. SOBEL: Well, I don't think that -- I mean,  
3       if the Court is concerned with one of them, I mean, we can  
4       go through every single one of them, of these criticisms,  
5       but a lot of them are really just cross-examination points  
6       and I don't think they go to methodologies. But if the  
7       Court would like us to address an issue, obviously, you  
8       know, that's what we are here for.

9                   THE COURT: Well, I think one thing I would like  
10      you to address is the qualification in the fifth on his  
11      secondary considerations and nonobviousness.

12                  MR. SOBEL: Okay. Okay. I think Cisco's  
13      criticism, I just want to make sure I understand what your  
14      question is so we don't go off field and waste time.

15                  But their criticisms seem to be that it exceeds  
16      the scope of his expertise because he, to determine the  
17      factors required by secondary consideration, long-felt need  
18      and --

19                  THE COURT: Right. See, long-felt need  
20      seems to be something that is probably not exceeding his  
21      expertise.

22                  MR. SOBEL: Okay. So which in particular?

23                  THE COURT: I'd like to hear about commercial  
24      success.

25                  MR. SOBEL: Okay. Okay.

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1 BY MR. SOBEL:

2 Q. So, Dr. Nourbakhsh, in your Honor I think it's  
3 Exhibit 2, you issued a rebuttal report; correct?

4 A. Yes.

5 Q. Why did you prepare that, aside from being asked?  
6 What was that rebuttal report, what did it show? What was  
7 it addressing?

8 A. Well, the rebuttal report is large. I think you're  
9 probably asking me about just the secondary considerations  
10 section, which is pages 2 through 9.

11 Q. Right. Okay.

12 A. And the idea here was counsel explained to me the  
13 secondary considerations and these headings, these concepts  
14 under which you could construe secondary considerations.  
15 And so for each of these, I thought about mining it  
16 vis-a-vis how -- what I know about XU's products and the  
17 relationship they have with other companies, what IBM said  
18 about XU, can lead me to conclusions about these.

19 Q. Okay.

20 A. I can walk you through them one by one.

21 Q. Well, I guess basically if we can address the Court's  
22 concern about commercial success and why those opinions are  
23 informed by your experience and knowledge in the contact  
24 center industry.

25 A. Well, my experience in the contact center industry was

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1 in many cases about working with other companies. Blue  
2 Pumpkin's job was to get not just resellers or OEMs, but  
3 core relationships with other companies, like large networks  
4 that we would be able to work with long-term.

5 So the idea to me carries a lot of weight about  
6 what another company will say about your product. And so to  
7 me, learning in this case about the fact that IBM, for  
8 instance, was interested, and I think I remember reading an  
9 e-mail where somebody at IBM said a really positive thing  
10 about XU's technology.

11 So learning about, for instance, IBM's response  
12 to seeing XU's technology was an important data point for  
13 me, just because I know what it's like --

14 THE COURT: I'm sorry, Dr. Nourbakhsh. When  
15 you say IBM saw XU's technology, what specifically did IBM  
16 see?

17 THE WITNESS: I don't recall the complete  
18 e-mail, but I think that they talked to XU. And the e-mail  
19 that I saw was I think between one IBM employee and another  
20 one in the document, talking about how valuable this would  
21 be, how available the XU technology would be. But I can't  
22 talk about the technology they saw.

23 THE COURT: All right. And commercial success,  
24 what is the basis for your conclusion that commercial  
25 success supports the idea that the XU patents were

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1 nonobvious or the invention and the patents were nonobvious?

2 THE WITNESS: The -- my basis is the idea that  
3 major companies believed at the time that using the  
4 technology XU had, which I infer to mean the patents, would  
5 make products that are commercial successes. So it's a  
6 third-party opinion about the commercial success you can  
7 achieve with the patent technology.

8 THE COURT: So your commercial success opinion,  
9 is it actually based on any actual commercial success?

10 THE WITNESS: Correct.

11 THE COURT: And in terms of the praise part of  
12 your report, is any of the praise directed to the two XU  
13 patents.

14 THE WITNESS: Let me go to the next and check  
15 what I wrote.

16 So when I talked with Mr. Turillo, one aspect of  
17 praise we talked about was about presence and connecting,  
18 which is -- which goes to the trade secrets, not the  
19 patents.

20 Another aspects of what he talked about  
21 was the idea behind the flexible ontology, which I believe  
22 is something that very specifically goes towards XU's  
23 patents.

24 THE COURT: All right. So, but in the rule of  
25 praise, Mr. Turillo is not exactly an outsider. Is there

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1 some praise in the industry you're aware of besides  
2 Mr. Turillo?

3 THE WITNESS: Let me see if I reference anything  
4 else. I mean, I'm aware of IBM's praise and I talk about  
5 that.

6 THE COURT: That's from one IBM employee to  
7 someone else?

8 THE WITNESS: It was also a PowerPoint  
9 presentation, I believe, that IBM made. I don't know if it  
10 was an intellectual property presentation or to outside  
11 parties. Anyway, they talk in a chart about the power of  
12 XU's technologies. Again, I don't know if that was  
13 specifically to the patents or to the trade secrets.

14 THE COURT: All right. I'm sorry to interrupt.  
15 You go ahead.

16 MR. SOBEL: Okay.

17 THE WITNESS: Can I add one other bit to that?

18 THE COURT: Go ahead.

19 THE WITNESS: Paragraph 43, I also mentioned  
20 some information from Philonenko, who was at Cisco.

21 BY MR. SOBEL:

22 Q. Okay. All right. Let me take you through some  
23 questions here.

24 In determining what to look at to determine  
25 whether the Cisco accused products met each limitation of

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1 the claims at issue, you testified you selected certain  
2 documents; is that correct?

3 A. That's correct.

4 Q. Okay. Why did you select those documents in  
5 particular?

6 THE COURT: Actually, I think I know what you  
7 are doing, Mr. Sobel, which is fine. Why don't we just  
8 assume that you sort of laid a prima facie case, they looked  
9 at the right documents, and we'll let the cross-examination  
10 see if there's anything wrong with that --

11 MR. SOBEL: Okay.

12 THE COURT: -- assumption.

13 MR. SOBEL: Fair enough.

14 Just give me a moment.

15 (Pause while counsel conferred.)

16 THE COURT: And I would say the same thing, too,  
17 on the question of functionality as used by the indirect or  
18 by the direct infringers. You know, the question of whether  
19 they necessarily were using optional features.

20 MR. SOBEL: All right. Then I just want to  
21 touch on a couple points to make sure we have a clear  
22 record.

23 BY MR. SOBEL:

24 Q. You opined as to whether Cisco's patents or patent  
25 applications disclosed XpertUniverse trade secrets?

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1 A. That's correct, I did so.

2 Q. All right. And how did you go about doing that  
3 analysis?

4 A. I read Cisco's patents and patent applications with  
5 care, and applied the same understanding to that as I had  
6 applied to all of the products that they disclosed.

7 MR. SOBEL: Okay, your Honor. To move this  
8 along, we're going to tender Dr. Nourbakhsh as an expert in  
9 the contact center industry and based on all of the, you  
10 know, opinions that he used, that he issued in his reports.  
11 And I guess I will just reserve the additional time I have  
12 to address any --

13 THE COURT: That's probably a good idea. Do you  
14 want a few minutes before we start, Mr. Schuman?

15 MR. SCHUMAN: Yes, your Honor. A short break  
16 would be great.

17 THE COURT: Okay. Let's take a short break.

18 And, Dr. Nourbakhsh, get some water, so we'll be  
19 back in ten minutes. Okay?

20 THE WITNESS: Very well.

21 (Short recess taken.)

22 - - -

23 (Proceedings resumed after the short recess.)

24 THE COURT: All right. Please be seated.

25 Dr. Nourbakhsh, please resume the stand. Mr.

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1 Schuman?

2 MR. SCHUMAN: Thank you, your Honor.

3 Your Honor, I, too, have some documents for my  
4 examination. Unfortunately, there's some duplication. For  
5 example, a copy of Dr. Nourakhsh's reports, but I have a  
6 binder. I would like to put it in front of the witness.

7 THE COURT: I certainly don't object.

8 Dr. Nourbakhsh, you're going to be given some  
9 different and some not so different stuff, but that's the  
10 way we do these things.

11 Go ahead.

12 (Mr. Schuman handed binders handed to the Court  
13 and to the witness.)

14 MR. SCHUMAN: Are we ready to begin?

15 THE COURT: I'm sorry. Go ahead.

16 CROSS-EXAMINATION

17 BY MR. SCHUMAN:

18 Q. Good afternoon, Dr. Nourbakhsh.

19 A. Good afternoon.

20 Q. Dr. Nourbakhsh, prior to this case, have you ever been  
21 retained as an XpertUniverse before for purposes of  
22 litigation?

23 A. No.

24 Q. And I take it you're getting paid for your time here  
25 today; right, sir?

1 A. That's correct.

2 Q. \$500 an hour; right?

3 A. It's \$350 an hour for normal time, \$500 an hour for  
4 trial time and deposition time.

5 Q. Thank you.

6 Among your opinions, Dr. Nourbakhsh, is that  
7 Cisco's Expert Advisor product infringes XU's two patents  
8 and also misappropriates its trade secrets; is that  
9 correct?

10 A. I have to look at the document to remind myself which  
11 trade secrets, but, yes, a subset of the trade secrets and  
12 two patents, yes.

13 Q. Have you ever used Expert Advisor, Dr. Nourbakhsh?

14 A. No.

15 Q. Did you ever inspect a working copy of Expert  
16 Advisor?

17 A. No.

18 Q. Have you ever examined the source code for Expert  
19 Advisor?

20 A. I have to refresh my recollection by looking at the  
21 documents. I've looked at an accidental markup database  
22 called source code card on all of them.

23 Q. It's your testimony, sir, that you've reviewed source  
24 code for Expert Advisor?

25 A. I don't remember if Expert Advisor is one of the ones

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1       that I've seen Excel documents or databases for. I don't  
2       recall.

3       Q.     Is it your testimony that you reviewed source code for  
4       any of the accused Cisco products in this case?

5       A.     I have reviewed XML data or database codes, which is a  
6       from source code for some of the products, yes.

7       Q.     Which products, Dr. Nourbakhsh?

8       A.     That's what I can't recall.

9       Q.     Have you talked about -- strike that.

10               Did do any analysis with regards to any of the  
11       customer deployments of Expert Advisor?

12       A.     I -- let's think about that. Let me refer to my first  
13       expert report.

14       Q.     Sure. It's tab 1 in the binder I just handed you, Dr.  
15       Nourbakhsh, or you can refer to your other copy.

16       A.     That's fine.

17               So you want to know whether I analyzed customer  
18       implementation of Expert Advisor?

19       Q.     Yes.

20               (Pause.)

21               THE WITNESS: I looked at industry specific  
22       applications with Expert Advisor for retail and retail  
23       banking, but not a particular customer, no.

24       BY MR. SCHUMAN:

25       Q.     Do you know who any of the customers for Expert

1 Advisor are, Dr. Nourbakhsh?

2 A. Not offhand, no.

3 Q. Do you know if they're in the United States or if  
4 they're outside of the United States?

5 A. I don't know the answer to that.

6 Q. You've also offered the opinion, Dr. Nourbakhsh, that  
7 Cisco's Virtual Expert Management product infringes both of  
8 XU's asserted patents and also misappropriates XU's trade  
9 secrets; is that correct?

10 A. Correct. Again, my recollection is that it is a very  
11 vague set of the trade secrets.

12 Q. Have you ever used Virtual Expert Management, Dr.  
13 Nourbakhsh?

14 A. No.

15 Q. Have you ever inspect a copy of Virtual Expert  
16 Management, Dr. Nourbakhsh?

17 A. I have not.

18 Q. Do you know whether a working copy of Virtual Expert  
19 Management ever existed?

20 A. I would have to review all of the literature that I  
21 read from Cisco. The roadmaps that I saw, depending on how  
22 you are going to carefully define the word working copy,  
23 indicate existing versions of it created for specific  
24 industry verticals. So that leads me to believe that there  
25 were working copies of it, absolutely.

1 Q. But you've never inspected a working copy; is that  
2 correct?

3 A. Correct.

4 Q. Did you ever examine source code for Virtual Expert  
5 Management, Dr. Nourbakhsh?

6 A. That's the same answer to your prior question. I  
7 don't recall which of the products I looked at the Excel  
8 market language for, the database calls and the source code  
9 for.

10 Q. Did you analyze any customer deployments or uses of  
11 the Cisco Virtual Expert Management product?

12 A. I think the same answer I gave before. I looked at  
13 the specific verticals, which is retail and retail banking.  
14 I did not look at a single expert on it.

15 Q. I take it, Dr. Nourbakhsh, you also have the opinion  
16 that Cisco's RemoteXpert product infringes XU's '903  
17 patent and also misappropriates its trade secrets; is that  
18 correct?

19 A. That's correct. Again, we have to look at the  
20 documentation to see which trade secrets I have the opinion  
21 it supports.

22 Q. Have you ever used RemoteXpert, Dr. Nourbakhsh?

23 A. No.

24 Q. Have you ever inspected a working copy of RemoteXpert,  
25 Dr. Nourbakhsh?

1 A. I've witnessed working copies on Internet videos, but  
2 I have not witnessed it in person, no.

3 Q. You are referring to Internet video demonstrations?

4 A. I'm referring to videos played on the computer.

5 Q. Things that you can download from the Internet?

6 A. Correct.

7 Q. The You Tube video, for example?

8 A. That's an example.

9 Q. Would you consider that a working copy of the  
10 product?

11 A. Would I consider the video a working copy? No. The  
12 video is a representation of somebody using the product.

13 Q. Thank you.

14 Did you ever examine any source code for  
15 RemoteXpert, Dr. Nourbakhsh?

16 A. The same question that I answered before. I have to  
17 look at the source documentation to remember which products  
18 I looked at the database and calls for.

19 Q. You don't have the specific recollection as you sit  
20 here today of reviewing source code for RemoteXpert, do  
21 you?

22 A. Actually, RemoteXpert is one of the products where I  
23 definitely did look at the database calls, because it was  
24 in looking at the database calls that I reached my  
25 conclusions.

1 Q. And it's your testimony that the database calls  
2 in the user manuals you reviewed for RemoteXpert is source  
3 code?

4 A. Absolutely, yes.

5 Q. Did you perform any analysis of any customer  
6 deployments of RemoteXpert during the course of your work on  
7 this case?

8 A. Once again, I'm aware of customer deployments, but I  
9 didn't analyze customer deployments to understand whether  
10 the infringement was --

11 Q. Did you do any analysis of the deployment of  
12 RemoteXpert at Home Depot during the course of your work on  
13 this case?

14 A. I did analysis in the cognitive sense I took into  
15 consideration that that is one of the deployments of the  
16 product, yes.

17 Q. And what documents did you review to inform yourself  
18 regarding how Home Depot is using Cisco's RemoteXpert  
19 product?

20 A. I can't recall, but I believe there were slides sent  
21 from Cisco that I reviewed that mentioned it and talked  
22 about it. The slide sets, I think that was the principal  
23 way I saw it in presentations made within Cisco.

24 Q. Did you see anything in those documents you just  
25 referred to that indicate that Home Depot has deployed

1 RemoteXpert in a way that supports multi-lingual support to  
2 users of that product?

3 A. I didn't see the specificity in the documents that  
4 would lead me to understand which language it uses in  
5 general, but I'm aware of Home Depot's operations in the  
6 country and understand the language and support in general,  
7 sure.

8 Q. You've also offered the opinion that Cisco's Pulse  
9 product infringes XU's '709 patent and also misappropriates  
10 XU's trade secrets; is that correct?

11 A. Again, the subject of trade secrets, I don't remember  
12 my conclusion on the '903 product. We would have to look  
13 for the sheets on that as well.

14 Q. At a minimum, you've offered the opinion that Pulse  
15 infringes the '709 patent and an also misappropriates some  
16 subset of XU's trade secret?

17 A. I want to be absolutely sure that if I say yes, that's  
18 true, so let's just really quickly check what I said about  
19 Pulse.

20 The Pulse agreement, I start on paragraph 177.  
21 It's the '903 patent and the '709 and a number of trade  
22 secrets, yes.

23 Q. I will just represent to you that Pulse is no longer  
24 accused of infringing the '903 patent. So my question was,  
25 do I have it correct, you hold the opinion that Pulse

1 infringes the '709 patent as well as misappropriates some  
2 subset of XU's trade secrets?

3 A. That's correct.

4 Q. Have you ever used Pulse, Dr. Nourbakhsh?

5 A. I have not.

6 Q. Have you ever inspected a working copy of Pulse?

7 A. I believe no.

8 Q. Do you know who the customers are for Pulse?

9 A. Not without research.

10 Q. So I take it from that answer, then, that you've never  
11 performed any analysis of how any customer is actually using  
12 the Pulse product. Is that a fair understanding?

13 A. I think the fair understanding is that my  
14 understanding of how customers would use Pulse is based on  
15 the documentation I've read.

16 Q. And that's it; right?

17 A. Not based on talking to a customer.

18 Q. Did you review any source code for Cisco's Pulse  
19 product, Dr. Nourbakhsh?

20 A. It's the same answer I gave to the prior question  
21 about source code. I do remember what expert XML calls, but  
22 I don't remember for Pulse whether I looked at the source  
23 code that ended up being relevant or not.

24 Q. What is a user guide, Dr. Nourbakhsh, in the context  
25 of software?

1 A. It's something that helps the end user understand how  
2 to use the product.

3 Q. And what is an admin guide or administrators guide?

4 A. It's something that helps the, I hate to use the same  
5 word again, that people that are configuring the product for  
6 the use of the end user understand how to configure it  
7 properly for use.

8 Q. And do you know whether Cisco created user guides and  
9 admin guides for its Pulse product?

10 A. Yes, it did.

11 Q. And in the course of developing your opinions in this  
12 case, did you review the user guide and the admin guide for  
13 Pulse?

14 A. I reviewed them after we had this same conversation at  
15 a deposition, because you reminded me that I had looked at  
16 them when I looked at the deposition of, I believe it was  
17 Mr. Ganew (phonetic) maybe, because they were exhibits to  
18 that and I had forgotten about them until you placed them in  
19 front of me.

20 Q. So it's your testimony, then, today, Dr. Nourbakhsh,  
21 that you had, in fact, reviewed the user guide and the  
22 admin guide for Pulse prior to forming your opinions about  
23 Pulse?

24 A. No. I formed opinions about Pulse, and then I  
25 reviewed the deposition of Mr. Ganew and saw the attachments

1 and reviewed them and they didn't change my opinion that I  
2 already formed about Pulse.

3 Q. Your testimony here today is you reviewed the user  
4 guide and admin guide for Pulse prior to your deposition?

5 A. I looked at them prior to my deposition. I reviewed  
6 them more carefully following my deposition after we had the  
7 same discussion.

8 Q. Let's listen to a portion of your deposition expert  
9 where we had this discussion.

10 (Deposition excerpt played as follows.)

11 "Question: Did you review, Dr Nourbakhsh,  
12 either the published user guide or the published admin  
13 guide for Pulse in connection with your analysis of  
14 the Pulse product?

15 "Answer: In the beginning of the section,  
16 I lift all of the documents that I reviewed. Shall we  
17 review that?

18 "Question: Whatever helps you answer my  
19 question.

20 "Answer: What are the two types of  
21 documents you're looking for?

22 "Question: The published user guide and the  
23 published admin guide for Pulse.

24 "Answer: No.

25 "Question: Why not?

Nourbakhsh - cross

1 "Mr. Stein: Objection.

2 "Answer: I reviewed everything that I was  
3 able to identify in the boxes of documents sent over.  
4 So this paragraph represents everything that I  
5 reviewed.

6 "My proposition for why I wouldn't have  
7 reviewed a document that sounds relevant is that it  
8 wasn't in the boxes that I went through.

9 "Mr. Schuman: You can you mark that as the next  
10 exhibit, please.

11 "Mr. Steinhoff: Is this the Bates number?

12 "Mr. Schuman: This particular document does  
13 not. I will represent to you this particular document  
14 was produced.

15 (Whereupon Deposition Exhibit No. 327 was marked  
16 for identification.)

17 "Mr. Schuman: I will just represent on the  
18 record that this document is publicly available on  
19 Cisco's website.

20 "By Mr. Schuman:

21 "Question: So, Dr. Nourbakhsh, turn for me,  
22 please, to page 2-5. Do you see at the bottom of 2-5  
23 it says Pulse locator search interface?

24 "Answer: Yes.

25 "Question: It says the Pulse locator search

Nourbakhsh - cross

1 interface appears in all pages of the Cisco Pulse  
2 graphical user interface. Figure 2-5 shows this  
3 interface in the home page. And then if you turn to  
4 the next page, do you see figure 2-5?

5 "Answer: Yes.

6 "Question: Do you recall seeing that figure in  
7 Dr. Forys' rebuttal report?

8 "Answer: I don't recall if I saw an exact  
9 duplicate, but it looks familiar, yes.

10 "Question: Identify for me, please, the inquiry  
11 criteria that are depicted on this figure 2-5.

12 "Mr. Steinhoff: Objection.

13 "Answer: To identify inquiry criteria and  
14 values on this page, I need to do a contextual  
15 understanding of this document that I'm seeing for the  
16 first time right now. I have to understand the  
17 document so that I can then consistently apply my  
18 interpretation of the patent to it."

19 (End of deposition excerpt.)

20 BY MR. SCHUMAN:

21 Q. Dr. Nourbakhsh, you also have offered the opinion in  
22 this case that Cisco's Quad product misappropriates some  
23 subset of XU's trade secrets; is that correct?

24 A. That's correct.

25 Q. Have you ever used Quad?

Nourbakhsh - cross

1 A. No.

2 Q. Have you ever inspected a working copy of Quad?

3 A. No.

4 Q. Have you ever examined the source code for Quad?

5 A. Same answer as before. It depends on what pieces of  
6 source code I've used in my various documents by Cisco.

7 Q. Have you done any examination of any customer  
8 deployments of Cisco's Quad product?

9 A. Let me remind myself of the document I looked at on  
10 Quad and see if I talked about this.

11 (Pause.)

12 THE WITNESS: I would have to look -- there's  
13 one document I looked at, which is the case study  
14 collateral. I would have to look at that in detail to see  
15 if that's a specific case study or vertical case study.

16 BY MR. SCHUMAN:

17 Q. As you sit here today, Dr. Nourbakhsh, do you have a  
18 specific recollection of who the Quad customers are?

19 A. No. Without looking at my writing, I don't have a  
20 recollection of the names of customers.

21 Q. You also offered the opinion, Dr. Nourbakhsh, that  
22 Cisco's SOAR program misappropriates XU's trade secrets;  
23 right?

24 A. That's correct.

25 Q. Have you ever used SOAR?

1 A. No.

2 Q. Have you ever inspected a working copy of SOAR?

3 A. No.

4 Q. Have you ever examined any source code for SOAR?

5 A. Same answer that I've given before to that same  
6 question on the other products.

7 Q. Is it a fair summary of your testimony that your  
8 analysis of the accused Cisco products is based on the  
9 documents in those boxes that were provided to you by XU's  
10 counsel in this case?

11 A. Partial. Not a fair exhaustive summary. It's based  
12 on the boxes and based on my prior knowledge about what  
13 existed, and that prior knowledge helps me to take the  
14 documents and the boxes and use them to formulate an  
15 understanding of how the Cisco products work.

16 Q. Fair enough.

17 Dr Nourbakhsh, I didn't mean to suggest that you  
18 didn't bring your expertise to bear on it, but with respect  
19 to specifically how the Cisco accused products operate, do  
20 we agree that your understanding of those products was based  
21 exclusively on the materials in those boxes that you  
22 received from Stroock?

23 A. That's correct.

24 Q. During Mr. Sobel's examination, do you recall some  
25 questions regarding a Genesys product called Expert Contact?

Nourbakhsh - cross

1 Do you remember that?

2 A. I do.

3 Q. I think you testified that that was one of the other  
4 technologies you looked at in connection with your work in  
5 this case; right?

6 A. I think the question was did I consider other  
7 products, and I said that Expert Contact is a product that I  
8 considered by reading the transcript of an interview with, I  
9 think Dr. -- Mr. Barton.

10 Q. Have you ever used Expert Contact, Dr. Nourbakhsh?

11 A. No.

12 Q. Did you review any code for Expert Contact in  
13 connection with your work in this case?

14 A. No.

15 Q. Did you review any of the published user guides or  
16 other manuals regarding Genesys' Expert Contact product in  
17 connection with your work in this case?

18 A. I may have when I looked at the original Forys  
19 report or rebuttal report. One of the tricky issues here  
20 is I looked carefully at all the exhibits Forys and  
21 Chatterjee provided, and to try to lend support to their  
22 arguments about why, for instance, Expert Contact might  
23 include trade secrets, they sometimes included these  
24 documents.

25 So I'd be remiss in saying no, no I didn't

1 review them directly, but I read those reports and reviewed  
2 all of the exhibits in those reports, and in so doing may  
3 have seen the kind of documents you're talking about.

4 Q. Let's focus just on your opinions, your affirmative  
5 infringement and misappropriation opinions as expressed in  
6 your opening expert report.

7 We agree that you address Genesys' Expert  
8 Contact product in that report; right?

9 A. Yes. It talks specifically about Mr. Barton's  
10 transcript vis-a-vis Expert Contact in that report.

11 Q. And your opinion that you express in your report,  
12 paragraph 55, is that Genesys' Expert Contact technology  
13 had shortcomings that are overcome by XU's technology;  
14 right?

15 A. The first line is that it had limitations and  
16 shortcomings that caused it to be an incomplete solution for  
17 the contact center space, which does not have anything to do  
18 with XU in particular.

19 Then I think I present five limitations to which  
20 Dr. Forsys responded.

21 Q. And those opinions in paragraph 55, those were  
22 formed based on your analysis of Mr. Barton's deposition  
23 testimony?

24 A. That's correct.

25 Q. And those opinions were not based on any analysis of

1 any of the published documents or other materials regarding  
2 Expert Contact; is that correct?

3 A. When I read Mr. Barton's deposition, which was  
4 thorough precisely because he was in charge of the  
5 end-of-life process for the product, had I felt like I  
6 needed more information, I would have looked at it. I  
7 certainly felt I understood enough about the product to come  
8 up with these specific conclusions about what it was  
9 missing.

10 Q. Based solely on your review of his deposition  
11 testimony; is that correct?

12 A. That's correct.

13 Q. In your -- in your report, Dr. Nourbakhsh, and also in  
14 the examination by Mr. Sobel, do you recall some discussion  
15 of something called K-World; right?

16 A. That's right.

17 Q. And you compared K-World to some of XpertUniverse's  
18 trade secrets and the asserted patents in this case in your  
19 report; right?

20 A. I think "compare" is a strong word. I don't compare  
21 K-World to the trade secrets. I compare it to the problem  
22 that was facing contact centers in this case, the idea of  
23 connecting to anywhere.

24 Q. Other than your conversations with Mr. Mike Turillo,  
25 did you do anything to for yourself regarding what K-World

1 was?

2 A. No, and the reasons for that are the same as I  
3 provided in the case of Expert Contact. He was able to  
4 provide his technical details with me on my interview with  
5 him and using managerial guidance to me. So I felt like I  
6 had everything I needed to understand those limitations.

7 Q. So therefore your opinions as expressed in your report  
8 regarding K-World were based on your expertise as well as  
9 your conversation with Mr. Turillo; is that right?

10 A. That's correct.

11 Q. And during the course of forming the opinions you  
12 express in your report regarding K-World, you did not review  
13 any documents regarding K-World; is that right?

14 A. I don't recall doing so, no.

15 Q. Did you take any notes during your conversation with  
16 Mr. Turillo, Dr. Nourbakhsh?

17 A. Yes.

18 Q. Do you still have those notes?

19 A. I don't know. They would have been in a flat text  
20 file. That's usually how I take notes on my computer.

21 Q. Other than your consideration of K-World and  
22 Expert Contact, you didn't analyze XU's technology for its  
23 trade secrets in light of any other specific products, did  
24 you?

25 A. I analyzed XU's technologies in light of every product

Nourbakhsh - cross

1       that I was aware of in the early 2000s. I didn't do it with  
2       respect to one particular products, but rather to the  
3       experience and knowledge I had about what was state of the  
4       art in the time in question.

5               I also analyzed it in view of the products,  
6       large number of which were presented after that first report  
7       by Mr. Forys.

8       Q.     So, Dr. Nourbakhsh, in your binder -- in your binder,  
9       Dr. Nourbakhsh, at tab 3 is your deposition transcript.  
10      Turn for me, please, to page 207.

11      A.     Tab 3?

12      Q.     Tab 3.

13      A.     Okay. I'm on 207.

14      Q.     Starting at line 2, I asked you the same question at  
15      your deposition:

16               "And that's your opinion -- your opinion, but my  
17      question was specific. Did you perform any specific  
18      analysis of these trade secrets in relation to any other  
19      specific products other than K-World and Genesys Expert  
20      Contact?

21               No."

22               Dr. Nourbakhsh, you would agree with me that a  
23      number of the patent claims in this case that you believe  
24      are infringed by the Cisco accused products are method  
25      claims; right?

Nourbakhsh - cross

1 A. They're of multiple types, correct, and some of them  
2 are method claims, yes.

3 Q. And you're aware that in order to infringe a method  
4 claim, each step of the claim must be practiced in the  
5 United States; is that right?

6 A. I understand that, yes.

7 Q. You understand that if a product had never been used  
8 in a way that meets all of the elements of a method claim,  
9 the method claim is not infringed; right?

10 A. I understand that, yes.

11 Q. Let's talk about Pulse. It's your opinion, Dr.  
12 Nourbakhsh, that Cisco's Pulse product infringes claims 1  
13 through 3 and 5 of the XU '709 patent; is that right?

14 A. Let's go to Pulse and the documents, if I may. Do you  
15 have paragraph numbers I should go to or should I just find  
16 it?

17 Q. I believe my question was just asking you if it's your  
18 opinion that Cisco's Pulse product infringes claims 1  
19 through 3 and 5 of the '709 product. That's your opinion;  
20 right?

21 A. I understand the question. You are giving me specific  
22 numbers and my recollection isn't good enough to know the  
23 precise numbers of all the claims for all the products, so I  
24 have to go and check if you want me to validate and verify  
25 what I wrote and believe.

Nourbakhsh - cross

1 Q. Go ahead.

2 A. Thank you.

3 (Pause.)

4 THE WITNESS: And I apologize. Remind me if you  
5 are talking about the '903 patent or '703 patent.

6 BY MR. SCHUMAN:

7 Q. I'm asking about your opinion regarding the alleged  
8 infringement of the '709 product by Cisco's Pulse product.

9 A. '709. Very well.

10 So claim 1, yes, I do, have an opinion for claim  
11 1, that's correct.

12 Yes, claim 3 is the next one that I have an  
13 opinion on, and then claim 5. 1, 3 and 5.

14 Q. And claim 1 is an independent claim; right?

15 A. It was an independent claim, yes.

16 Q. And claim 5 is an independent claim; right?

17 A. Correct.

18 Q. And the other claims that you just mentioned are  
19 dependent claims; right?

20 A. Claim 3 is a dependent claim, yes.

21 Q. Dr. Nourbakhsh, and it's your opinion that Cisco's  
22 Pulse product meets all of the elements of claim 1 and claim  
23 5 of the '709 patent; right?

24 A. My opinion is that Pulse literally infringes on claims  
25 1, 3 and 5, yes.

Nourbakhsh - cross

1 Q. And so the second to last element, Dr. Nourbakhsh, of  
2 claim 1 of the '709 patent is designating a parameter that  
3 indicates a source from which inquiry criteria values are  
4 received; right?

5 A. That's correct.

6 Q. And it's your opinion that that element is found in  
7 Cisco Pulse because of the block diagram you found in the  
8 document entitled query engine; right?

9 A. In the paragraph, I identified the federator and the  
10 index management system as items in the system that together  
11 point to the inquiry criteria values, yes.

12 Q. But the only document -- and those are found in the  
13 query engine document; right, Dr. Nourbakhsh?

14 A. That is the reference that I used for that, yes.

15 Q. And have you since seen, since you formed these  
16 opinions, Dr. Nourbakhsh, the declaration of Mr. Sateesh  
17 Gaddam from Cisco?

18 A. Yes. He explained that the query engine as written in  
19 the document was not implemented, that rather the thing that  
20 was implemented in its lieu has but one index.

21 Q. So you would agree with me, then, that the document  
22 you cite here in Exhibit 205 was a document generated during  
23 the course of the development process of the product; is  
24 that right?

25 A. I think the likeliest explanation for that disconnect

1 is that this document doesn't reflect the exact way the  
2 query engine was designed for some specific version of the  
3 query engine that the gentleman is speaking of, yes. It was  
4 a mismatch. Whether that means some version of Pulse had  
5 multiple indices versus one indices, I don't know. What I  
6 do know is that it doesn't matter whether you have one  
7 indices or multiple indices.

8 So when I saw his comment, that did not strike  
9 me as something that ruins the case that I'm making for this  
10 element.

11 Q. The fact that the document that you rely on as the  
12 basis for your opinion as to this element does not reflect  
13 the final product does not change your opinion regarding  
14 infringement.

15 Is that your testimony, Dr. Nourbakhsh?

16 A. My testimony is that his specific testimony in saying  
17 it didn't have multiple indices explicitly is opening the  
18 door for the notion that it had one index. And whether you  
19 have multiple indices or one index, the fact of the matter  
20 is, if you are going to point to inquiry criteria values in  
21 a database system, you have a pointer, and that pointer has  
22 to reside somewhere.

23 I was identifying the federator because that was  
24 an obvious place where there is clearly an index to that  
25 pointer.

1 Q. And you found the federator that you are referring to  
2 in that testimony in the query engine document that you cite  
3 in paragraph 205 of your report; is that right?

4 A. That's correct.

5 Q. Let's talk about RemoteXpert.

6 It's your opinion that RemoteXpert infringes  
7 XU's asserted '903 patent; right?

8 A. That's correct.

9 Q. And it's your opinion that -- let's put some claim  
10 language up on the screen. This might be easier for  
11 everyone.

12 I have up on the screen, Dr. Nourbakhsh, a  
13 portion of the language of claim 1 of the '903 patent.

14 You would agree with me that the first element  
15 after the preamble, providing an inquiry-type computer  
16 database populated with a first layer of predetermined  
17 semantically expressed inquiry types organized from an  
18 underlying plurality of criteria groupings that are humanly  
19 understandable descriptors is one of the elements of novelty  
20 of this patent, in your opinion.

21 Right?

22 A. That's correct.

23 Q. And in your opinion expressed in your report, you  
24 identified something called expert types from an expert type  
25 table as the inquiry types; right?

1 A. Yes. If I recall, there's a Rev ED table in the Rev  
2 database. Skill and expert types. And I was able to show  
3 that expertise skills and expert types, if I recall  
4 correctly, actually represent underlying criteria and layers  
5 of inquiry.

6 Q. And I think you just mentioned this, but you would  
7 agree with me that we have to identify in order to find  
8 literal infringement both something called inquiry types as  
9 well as an underlying plurality of criteria groupings;  
10 right?

11 A. Absolutely. What you have to do with the novelty of  
12 the patent and the way RemoteXpert does it, you have an  
13 underlying structure of inquiry. I can't remember if it's  
14 expertise skills or expert types of underlying foundation.  
15 And then the other one is easier to change and it points to  
16 it so that you have flexibility at the high level.

17 Q. RemoteXpert, what you have found in your opinion to  
18 meet the limitation underlying plurality of criteria  
19 groupings is what you called expertise skills; is that  
20 right?

21 A. I have to look, because it's easy to confuse the  
22 expertise skills with expert types.

23 Q. And --

24 A. Let me take a look.

25 Q. If you could take a look at paragraph 130 of your

Nourbakhsh - cross

1 report and if I've misled you, you can look wherever you'd  
2 like.

3 (Pause.)

4 THE WITNESS: Okay. I think I've got it.

5 I think it was expert skills that are the  
6 underlying criteria and I believe expert skills or expertise  
7 skills, that's right, and expert types are a form of layers  
8 of inquiry.

9 I realize it's odd because they use the word  
10 "expert" in RemoteXpert to refer to something that really  
11 should be called inquiry, but in looking at the code and how  
12 the XML markup assigns values to the buttons in figure 22  
13 and elsewhere, it becomes clear the word "expert" really  
14 means inquiry in this case.

15 BY MR. SCHUMAN:

16 Q. Right. So in your opinion, the table you are looking  
17 at, when it talks about expert types, in your opinion it is  
18 really talking about what the patent calls inquiry types,  
19 and when it talks about expertise, skills, in the  
20 documentation you reviewed, that's actually the underlying  
21 plurality of the criteria grouping in the patent? Have I  
22 got your opinion right?

23 A. Well, each expertise skill is -- the way expertise  
24 skills are laid out in the code, group of expertise skills  
25 is a, yes, criteria grouping. Underlying criteria grouping,

1       that's correct.

2       Q.     I'm sorry. What code are you referring to in that  
3       answer, Dr. Nourbakhsh?

4       A.     When I looked at the way that the buttons on the  
5       screen are presented as an interface to the user, or  
6       accessing information about what to present to the user,  
7       presenting types of inquiries to the user to choose between,  
8       that's the code that I'm talking about.

9       Q.     Oh, so you weren't talking about source code in your  
10      prior answer?

11      A.     That is source code.

12      Q.     Your review of the -- the screen, the graphical user  
13      interface?

14      A.     XML markup that commands the system to go to a  
15      database and find values, paint buttons on the screen and  
16      provide values in those buttons that are semantically  
17      important. That is actually source code. That is code  
18      that's going to tell you what to do.

19      Q.     Dr. Nourbakhsh, in paragraph 130 of your report for  
20      the expertise skills that you identify as meeting the  
21      limitation underlying plurality of criteria groupings, you  
22      cite a document 382951.

23                   Do you see that?

24      A.     Yes.

25      Q.     And you agree with me that that is the basis for your

1 finding expertise skills in RemoteXpert to meet this  
2 limitation of the claim?

3 A. That's a basis. I don't recall without reviewing the  
4 documents whether I had multiple documents relating to that  
5 conclusion or not.

6 Q. So, Dr. Nourbakhsh, in the binder I handed you is  
7 actually the document that you cite there. It's the, yes,  
8 it's the big document in the front flap.

9 A. The native data dump.

10 Q. Right. You call this a data dump in your report, is  
11 that right, in paragraph 130?

12 A. Yes.

13 Q. Dr. Nourbakhsh, isn't this one of those customer  
14 surveys that you were describing in your prior testimony  
15 with Mr. Sobel?

16 A. The providence of this is not something I can say with  
17 certainty. What I can say is that this is identifying  
18 specific features that are solution requirements.

19 The topic says solution requirements. A survey  
20 is typically a form that a customer fills out. A solution  
21 requirement document is much later in the process. It's at  
22 the point where you're deciding what the functionality is  
23 that you probably must have. That's why it's a very useful  
24 document to look at.

25 Q. And you say much later in the process, Dr. Nourbakhsh.

1       Wouldn't you agree with me that a solutions requirements  
2       document like this document we're looking at is created  
3       prior to any architecting of the product?

4       A.     A solutions requirement document is absolutely a  
5       living document. Its initial creation dates can be early,  
6       but it ends up having critical value throughout the software  
7       processing and QA processing. Even at QA, you use it to  
8       check the functionality and the comments against the  
9       functionality the software has for quality assurance, to  
10      ensure that the right functions actually exist before you  
11      send it out for customers to try.

12      Q.     You would agree with me, wouldn't you, that every  
13      requirement listed in a customer survey document like this  
14      does not get implemented in the final product?

15      A.     This is not a customer survey document. Again, a  
16      customer survey document is a -- either a form that a  
17      customer is filling out or a report on a customer's survey  
18      results. This is a roll-up of all of the requirements,  
19      functionality that the product is going to have.

20      Q.     Including the functionality identified in the document  
21      as optional or highly desirable, is it your testimony that  
22      all of the functionality identified as optional or highly  
23      desirable would be necessarily implemented in the final  
24      product?

25      A.     No, no, that's not my testimony.

Nourbakhsh - cross

1 Q. And is it your testimony, Dr. Nourbakhsh, that all of  
2 the functionality identified in this document was actually  
3 implemented in the RemoteXpert product?

4 A. No, that's not my testimony.

5 Q. All right. Dr. Nourbakhsh, in any of the documents  
6 that you reviewed describing the final RemoteXpert product,  
7 did you see any reference at all to this document, Cisco  
8 382951?

9 A. I didn't evaluate the amount of cross-indexing of  
10 internal Cisco documents to one another. I evaluated the  
11 concepts in documents, where the final documents that I  
12 looked at for, in this case, RemoteXpert indexing or linking  
13 to the concept, the functions or features that are in this  
14 document, yes, absolutely.

15 Q. And you saw these specific expertise skills identified  
16 in the final RemoteXpert products?

17 A. I would have to look through the rest of my  
18 RemoteXpert analysis to remind myself what database is  
19 contained in the skills. What I do recall is in the later  
20 elements of this claim, that there's a place where we were  
21 relate the expert skills, the actual expert skill sets to  
22 these skills to the underlying criteria pretext.

23 So I believe elsewhere in this I did go through  
24 the effort of understanding the relationship of expertise  
25 skills to expert types, yes.

Nourbakhsh - cross

1 Q. In the second element in this claim, Dr. Nourbakhsh,  
2 associating in a database one or more other layers of  
3 inquiry types with the underlying criteria groupings, the  
4 one or more other layers of inquiry types having a  
5 one-to-one correspondence with the first layer of  
6 predetermined semantically expressed inquiry types.

7 In your opinion, Dr. Nourbakhsh, that's another  
8 one of the elements of novelty of this patent; is that  
9 right?

10 A. That's correct.

11 Q. And it's your opinion, Dr. Nourbakhsh, that  
12 RemoteXpert has multiple layers of inquiry types because it  
13 provides multi-lingual support; right?

14 A. Let me remind myself by looking at paragraph 131.  
15 Excuse me.

16 (Pause.)

17 THE WITNESS: Yes.

18 BY MR. SCHUMAN:

19 Q. You would agree with me that there are multiple  
20 different ways to implement multi-lingual support in a  
21 software product?

22 A. In different software products, yes.

23 Q. And what specific documentation did you review in this  
24 case, Dr. Nourbakhsh, to inform yourself as to how  
25 RemoteXpert implements multi-lingual support?

Nourbakhsh - cross

1       A.       It's precisely what I wrote in 131. The fact that I  
2       understood the database architecture of RemoteXpert as I  
3       have written here led me to understand that in the case of  
4       RemoteXpert, in order to have multi-lingual support, that is  
5       to say in order to be able to have different inquiry types  
6       labeled in different languages, they needed to have in the  
7       database different instances of what they call expert types.  
8       Therefore, the way that they would have to implement it,  
9       precisely because of the way of the buttons on the screen  
10      and provide text for those buttons is one of the ways you  
11      end up requiring different inquiry-type layers.

12      Q.       What RemoteXpert database did you analyze, Dr.  
13      Nourbakhsh, in connection with your work in this case?

14      A.       I recall a table called RESC\_DB, which is a database  
15      table associated with one of the RemoteXpert databases.

16      Q.       Any other bases for your opinion, Dr. Nourbakhsh, that  
17      RemoteXpert implements multi-lingual support with multiple  
18      layers in an inquiry-type database?

19      A.       My basis for that is all the documents that I  
20      reviewed that are listed in paragraph 128, which told me  
21      what the database architectural format of RemoteXpert is,  
22      and therefore how it needs to implement multi-lingual  
23      support.

24      Q.       Claim 1 is a method claim. Is that correct, Dr.  
25      Nourbakhsh?

1 A. Yes. Correct.

2 Q. And I think we covered this, but you're not aware of  
3 any RemoteXpert customer actually using multi-lingual  
4 support in its deployment of RemoteXpert, are you?

5 A. I have every reason to presume that any company that  
6 generally provides access to customers in multi-lingual  
7 fashion will certainly do so when they are trying to connect  
8 experts to customers. They are not going to do a single  
9 language in that one case.

10 Q. Let's talk about Expert Advisor. Your opinion is that  
11 Expert Advisor infringes -- among your other opinions, you  
12 hold the opinion that Expert Advisor infringes the asserted  
13 claims of the '709 patent; is that correct?

14 A. I'm just going to the Expert Advisor section.

15 (Pause.)

16 THE WITNESS: All right. I'm there. '709  
17 patent and '903 patent and number of trade secrets, yes.

18 BY MR. SCHUMAN:

19 Q. Let's talk just a little bit about your opinion that  
20 it infringes the '709 patent, Dr. Nourbakhsh.

21 Therefore, in your opinion, the Expert Advisor  
22 product includes the claims interactive problem definition  
23 page; is that right?

24 A. Correct.

25 Q. And you understand that the Court has construed the

1 term interactive problem definition page to be an  
2 interactive graphical user interface; right?

3 A. Correct.

4 Q. And you've never tried to access Expert Advisor from  
5 an interactive graphical user interface, have you?

6 A. I've never tried to access Expert Advisor in any way  
7 personally, but, rather, have read the UCC-UCCE  
8 documentation and all the Virtual Expert Management  
9 documentation, all of which makes use of Expert Advisor.

10 Q. You mentioned Virtual Expert Management, Dr.  
11 Nourbakhsh.

12 You understand that Cisco sold Expert Advisor  
13 and Virtual Expert Management separately; right?

14 A. I understand marketing. However, for the purposes of  
15 technically understanding products, I also understand that  
16 it does not make technical sense for me to value them  
17 separately when it's obvious from all the documentation  
18 I've read that Virtual Expert Management's core engine is  
19 Expert Advisor, just like Expert Advisor is a core part of  
20 an enterprise.

21 You can't divorce these products from one  
22 another. And from a marketing point of view, you can talk  
23 about how you sell them and what monikers they you use, but  
24 as far as I'm concerned, I have to evaluate them together  
25 because they form a cohesive functionality.

1 Q. There were customers for Expert Advisor; right?

2 A. I don't understand the question.

3 Q. You're aware that there are customers for Cisco's  
4 Expert Advisor product; right?

5 A. Yes.

6 Q. And there are no customers for Cisco's Virtual Expert  
7 Management product; right?

8 A. Again, to answer the territory of understanding and  
9 defining the word "customer." Whether something was piloted  
10 and therefore it was never paid for or it was given to  
11 somebody free as a bundle is irrelevant to my analysis of  
12 the fact that it infringes in terms of functionality it has  
13 and the way it is used.

14 Q. Dr. Nourbakhsh, when we addressed this at your  
15 deposition, this is Page 135 of your deposition transcript,  
16 line 16. You can turn to it. It's Exhibit 3 in your  
17 binder, at tab 3.

18 A. Say it again, the page number and all of that.

19 Q. Page 135, line 16.

20 A. Yes.

21 Q. I asked you:

22 "Are you aware that Expert Advisor was released  
23 by Cisco and actually sold separately from Virtual Expert  
24 Management?"

25 You said, "Yes."

Nourbakhsh - cross

1                   And, Dr. Nourbakhsh, among the other documents  
2                   that you reviewed in this case, I think on your list  
3                   attached to your report, your opening report, was the  
4                   deposition of Cisco's Mike Lepore.

5                   Do you remember reviewing his testimony?

6           A.       I do, yes.

7           Q.       And do you remember some testimony -- and who is  
8                   Mr. Lepore, if you remember, Dr. Nourbakhsh?

9           A.       I don't remember that. I'm sorry. I have to review  
10                   that to find out.

11          Q.       Mr. Lepore was Cisco's 30(b)(6) witness on Expert  
12                   Advisor and also one of the lead architects on Expert  
13                   Advisor. And I would like to show you an excerpt from his  
14                   deposition testimony.

15                   Dr. Nourbakhsh, when Mr. Lepore was deposed as a  
16                   30(b)(6) witness, he was asked by XU's counsel:

17                   "So my question is, would the front end for a  
18                   system like this be limited to an IVR system?"

19                   I want to just stop there. What's your  
20                   understanding of an IVR system?

21          A.       It's an interactive voice routing system. Push 1 for  
22                   sales, 2 for marketing, et cetera.

23          Q.       You would agree with me an IVR system is not an  
24                   interactive graphical user interface?

25          A.       Not by the definition of this Court for this

1 limitation, no.

2 Q. Your interpretation of interactive graphical user  
3 interface would include a telephone dial-up system?

4 A. No. I said no.

5 Q. Okay. So when Mr. Lepore was deposed, he was asked,  
6 would the front end system like this be limited to an IVR  
7 system? There was some question and answer. And then his  
8 answer is: The front end for Expert Advisor is limited not  
9 only to IVR, it's limited to customer voice portal, I  
10 believe. We had a bunch of features that are not available  
11 if you used a different IVR and I think we may have actually  
12 restricted it only to CVP.

13 Did you review that testimony before offering  
14 your opinion that Cisco's Expert Advisor product infringes  
15 the limitation of the '709 patent, claim 1, requiring an  
16 interactive graphical user interface?

17 A. I reviewed this and I think I explicitly referred to  
18 this in, I think in my rebuttal write-up, because I pointed  
19 out that, in fact, he said this, and yet when I look at  
20 Virtual Expert Management, it's very clear to me that  
21 Virtual Expert Management bundles in a way that includes a  
22 graphical interface.

23 And therefore I need to take all the documents I  
24 have and make a decision, even though what he's saying is  
25 inconsistent with the documents that show me that a PE

1 includes Expert Advisor.

2 Q. How about for what's called the standalone version of  
3 Expert Advisor, Dr. Nourbakhsh? So those customers who  
4 purchased Expert Advisor without Virtual Expert Management,  
5 you would agree with me that an IVR system, the front end  
6 for that deployment of Expert Advisor does not include an  
7 interactive graphical user interface.

8 Would you agree with that?

9 A. When I started the analysis in this case, I assumed  
10 indeed what was being represented by Cisco, there was this  
11 concept for the standalone advisor product, but the more  
12 I've learned, the more I've seen thinks like contact center  
13 enterprise, including bundling in Expert Advisor, the less  
14 I'm willing to make a bet on the idea that Expert Advisor is  
15 a standalone product per se.

16 I believe it's heavily bundled. I believe it's  
17 heavily bundled into UCCE, and therefore I'm of the opinion  
18 that if we're going to see whether there is some animal  
19 called Expert Advisor that never has a graphical user  
20 interface, we're going to have to dig into whether UCCE ever  
21 allows somebody to use Expert Advisor in a way where IVR is  
22 the only interface in, and I'm doubtful that's the case.  
23 It's highly unlikely.

24 Q. Highly unlikely, but you have not actually done any  
25 analysis of any of the actual customer deployments of Expert

Nourbakhsh - cross

1 Advisor, have you?

2 A. That's correct.

3 Q. I want to go back to Pulse for one minute, Dr.

4 Nourbakhsh. We're going back to the '709 patent now.

5 That's your opinion that Pulse infringes the '709 patent.

6 We talked about the claim limitation for the

7 '709 patent earlier designating go a parameter that

8 indicates a source from which inquiry criteria values are

9 received. I want to talk about a different one of the

10 limitations in the '709 patent, claim 1.

11 A. Hold on one second while I get to Pulse.

12 Q. Sure.

13 A. So I can read the claim.

14 Q. Sure.

15 (Pause.)

16 MR. SOBEL: Your Honor, it seems like a lot of

17 the questions that are going on here really go to the weight

18 of testimony, talking about, you know, whether this is more

19 valuable than this piece and not really to the methodology

20 that Dr. Nourbakhsh used to determine infringement.

21 THE COURT: All right. Well, thank you.

22 THE WITNESS: I'm getting there. Okay.

23 BY MR. SCHUMAN:

24 Q. Paragraph 201 of your report, Dr. Nourbakhsh.

25 A. 201. Okay. Ou said the '709 patent; correct?

1 Q. Correct.

2 A. All right.

3 Q. So one of the elements, Dr. Nourbakhsh, that you  
4 believe is met by the Cisco Pulse product is pre-selecting  
5 prior to receiving an inquiry from a second member of the  
6 organization the quantity of inquiry criteria and values in  
7 accordance with a predetermined context.

8 And it's your opinion that that is one of the  
9 elements of novelty of the '709 patent; right?

10 A. Yes. I remember that element as I read it.

11 Q. And in paragraph 201 of your report, Dr. Nourbakhsh,  
12 it's your opinion that that element is found in the black  
13 list concept of Cisco Pulse; right?

14 A. That's one of the ways it's found, yes. I don't  
15 remember if I mentioned this paragraph, the white list.  
16 Yes, the black list is definitely an example where that's  
17 found.

18 Q. And you can take a look at paragraph 201 for me, Dr.  
19 Nourbakhsh, and confirm that black list is the only list  
20 referenced in paragraph 201 of your report.

21 A. Actually, paragraph 201 says a typical example is  
22 demonstrated with vocabulary builder, which is interesting  
23 because vocabulary builder is basically making sure that  
24 your vocabulary, just like we talked about trade secrets,  
25 the vocabulary serves different people differently. So

1 managers use different things from regular experts.

2 White list and black list are two ways of doing  
3 that. I believe if I recall correctly, Pulse also, when you  
4 log in as a manager or a high level member of the  
5 organization, you're going to get more access of vocabulary  
6 than you would get, so the black list does not apply to you,  
7 for example.

8 Q. Can you just please explain for the Court what a black  
9 list is.

10 A. A black list is a selection of words that at the same  
11 time says, don't show these words and therefore do show all  
12 other words, for example. For example, maybe at the VP  
13 level, you have a top secret project with the property of  
14 defense. The VPs know about it and it's okay to talk about  
15 military grade munitions.

16 If you those put military grade munitions on the  
17 black list and explain you don't want level 1 experts to see  
18 that word, then when seekers come in and try to connect to  
19 experts, they're never going to get connected to somebody or  
20 see words that relate to military grade munitions unless  
21 they have the right authorization for that.

22 So black list helps discriminate what you do see  
23 and you don't see.

24 Q. And a white list, Dr. Nourbakhsh?

25 A. Is the exact same thing, complementary, meaning that

1       you should definitely see.

2       Q.       We spoke over each other. Say that again. A white  
3       list is?

4       A.       It's complementary to the black list. It can be a  
5       list of things that you definitely do want to see, for  
6       instance.

7       Q.       So the black list terms are not displayed; is that  
8       right?

9       A.       No. The black list defines what is and isn't  
10      displayed. The black list terms are an identification of  
11      the words, not the display. The black list's purpose is to  
12      decide what to display and not to display.

13      Q.       And you understand that black list functionality and  
14      Pulse is optional functionality, don't you?

15      A.       I would have to review Pulse again, but the fact that  
16      an administrator guide says you can create as many black  
17      lists as you want means that they're going to use it in the  
18      that way it's programmed for the industry.

19                   Again, the part of this whole thing comes  
20      because we're requesting organizational boundaries, and  
21      therefore we're going to be in a situation where it's  
22      exciting for a manager to have as many words as possible in  
23      a system and be able to organize them so that the right  
24      people can see the right words.

25      Q.       The Pulse administrator guide we talked about before,

1       this is one of those documents that may or may not have been  
2       in the box of documents you received from Stroock. This is  
3       Exhibit 75 to the declaration in support of this motion  
4       we're here about today.

5               This is an excerpt from the Pulse user guide,  
6       sorry, from the Pulse administrator guide. While having a  
7       Pulse vocabulary uploaded to the system upon deployment of  
8       Cisco Pulse is mandatory, the creation of a restricted  
9       vocabulary and the timing of its deployment are up to the  
10      discretion of the organization.

11             You agree that the restrictive vocabulary is the  
12      black list?

13      A.     Yes. Likely we're talking about the exact same  
14      thing.

15      Q.     Right. And so the Pulse Administrator Guide says the  
16      restricted vocabulary or the black list is optional, I'm  
17      sorry, discretionary with the organization that's deploying  
18      Pulse; right?

19      A.     It has to be at the discretion of the organization  
20      because the whole point is, the organization is going to  
21      want to do all the firewall on its own. It makes perfect  
22      sense to say to the organization it's up to their discretion  
23      to decide how to formulate the vocabulary.

24      Q.     And I may have asked you this earlier, but you have  
25      not done any analysis of how any specific customer for Cisco

1 Pulse has deployed Pulse, have you?

2 A. Again, I have to review the slide set from Cisco. In  
3 many of the slide sets that I reviewed from Cisco, they were  
4 about convincing managers at Cisco why your product is a  
5 good idea and should sell it.

6 In many other cases, the slides that I was  
7 looking were evaluations of how it would be used by some  
8 pilot, showing off how well it works and therefore how  
9 valuable it is to the company.

10 I had to review slide sets I reviewed for Pulse  
11 to see whether in this particular case Pulse is one of the  
12 products I saw real customers being shown off as excellent  
13 users.

14 Q. Dr. Nourbakhsh, when I asked you this question at your  
15 deposition, I said, do you know whether the black list is a  
16 mandatory or optional functionality of Pulse?

17 You said, I do not know.

18 I said, do you know whether any user of the  
19 Pulse product has used the black list functionality that you  
20 identified of satisfying this element of the claim in your  
21 report?

22 Answer: I do not know.

23 Let's turn to the trade secret opinions. I'm  
24 almost out of time.

25 I just want to make sure one thing is clear. I

Nourbakhsh - cross

1 think we've heard quite a bit about your mapping  
2 methodology. I just want to ask you the starting place for  
3 that mapping exercise was the list of XU's trade secrets  
4 that was provided to you by Stroock. This is Daubert  
5 Exhibit 4; right?

6 A. That's correct.

7 Q. Do you have Daubert Exhibit 4 in front of you?

8 A. Yes.

9 Q. Turn for me, please, to item No. 18.

10 A. I'm there.

11 Q. Do you see No. 18?

12 A. I do.

13 Q. Do you see there are some specific Bates numbered  
14 documents identified there?

15 A. I do.

16 Q. And did you review any of those documents in the  
17 course of your preparation of your opinions in this  
18 case?

19 A. I'd have to refer to my report to see if I -- if I  
20 opined on trade secret 18 or not.

21 Q. You would agree with me, Dr. Nourbakhsh, that if you  
22 had, in fact, reviewed any of those documents identified by  
23 Bates number in Item No. 18, they would then be identified  
24 on your list of documents reviewed, I believe that's  
25 Exhibit A, to your initial report and also another exhibit

1 to your rebuttal report?

2 A. Yes. I agree that if these are any of the documents  
3 that I looked at and generate an opinion based on in my  
4 report, I would reference them, correct.

5 Q. And just so the record is clear, it's Exhibit A to  
6 your opening report is your list of documents considered;  
7 right?

8 And I'm not going to ask you, Dr. Nourbakhsh, to  
9 take the time right now. I will represent to you that none  
10 of these Bates numbered documents are listed on Exhibit A  
11 there, and I will further represent to you that they're not  
12 listed on the similar exhibit to your rebuttal report.

13 So would it be fair to conclude, then, that none  
14 of these specific documents were reviewed by you during the  
15 course of your preparation of your misappropriation  
16 opinions?

17 A. The best way to answer that question, which obviously  
18 I need the exercise, so to speak, is to look at the trade  
19 secret rows that I have my call sheets.

20 If 18 is blank, then I didn't attempt to  
21 validate or verify trade secret 18 in each of those  
22 products. If it isn't blank, then those specific documents  
23 I did use in view of that.

24 What I can tell you is that when I went through  
25 the boxes and boxes of Cisco, when I was reducing it to the

Nourbakhsh - cross

1 boxes that would be sent to me in Pittsburgh, there were a  
2 number of documents that had different Bates numbers and  
3 were the exact same document. They were users guides like  
4 that. Of course, there are also documents that had  
5 different Bates numbers that were different versions, but  
6 there are also absolutely identical documents that had  
7 different Bates numbers.

8 So I definitely cannot just agree that I never  
9 looked at these documents without looking at the documents  
10 because it's entirely conceivable that one, the ones I  
11 referenced here are the same document, different Bates  
12 number. I saw that in the boxes that came over.

13 Q. Your opening report, Dr. Nourbakhsh, Daubert  
14 Exhibit 1, Exhibit A to that report, that's all the  
15 documents that you reviewed in connection with the  
16 formulation of the opinion in Daubert Exhibit A; right?

17 A. Correct.

18 Q. And I have the same question for you, Dr. Nourbakhsh,  
19 regarding item number 33 on XU's trade secret list. There  
20 are some specific documents identified there by Bates  
21 number.

22 A. Yes.

23 Q. And you would agree with me that if those specific  
24 documents were reviewed by you in the course of your  
25 formation of your misappropriation opinions, they would then

Nourbakhsh - cross

1 be identified on your list of documents considered Exhibit A  
2 to your opening report, which is Daubert Exhibit 1?

3 A. Or a document would be identified there that had a  
4 different Bates number. I'm just saying don't match on  
5 Bates number, match on the content.

6 MR. SCHUMAN: Your Honor, can I approach?

7 THE COURT: Yes.

8 MR. SCHUMAN: This is the same exact binder that  
9 we used on Wednesday at the summary judgment hearing. I  
10 just want to show these documents to Dr. Nourbakhsh and  
11 see if he has -- I want to show the documents to Dr.  
12 Nourbakhsh.

13 THE COURT: So maybe, I'm not sure XU brought  
14 their copies with them.

15 MR. SCHUMAN: I have a copy.

16 (Mr. Schuman handed binders to the Court and to  
17 the witness.)

18 THE COURT: I take it, Mr. Schuman, you're  
19 almost done?

20 MR. SCHUMAN: I am, your Honor.

21 BY MR. SCHUMAN:

22 Q. Dr. Nourbakhsh, the first document in the binder I  
23 just handed you, you recognize that document; right?

24 A. This is the NDA, I believe. Yes. This is the NDA  
25 between XU and Cisco Systems.

Nourbakhsh - cross

1 Q. And you testified, you testified earlier that you  
2 reviewed that document prior to preparing your opinions in  
3 this case?

4 A. That's correct.

5 Q. Dr. Nourbakhsh, did you review any other NDAs between  
6 XpertUniverse and any other company during the course of  
7 your work on this case?

8 A. I don't recall if I read any other NDAs. I think it's  
9 likely that this is the only NDA I looked at in detail  
10 because I was curious about this NDAs contents. I do recall  
11 talking to both Mr. Fateman and Mr. Steinhoff about their  
12 practices to see if they, in fact, ensured that everybody to  
13 whom they provided information about it the signed an NDA  
14 and they said yes.

15 Q. But you -- the only NDA you actually reviewed in  
16 connection with forming your opinions in this case is the  
17 one in front of you now, the NDA between XU and Cisco;  
18 right?

19 A. This is the NDA that I reviewed in detail, yes.

20 Q. And are you suggesting that you reviewed any other  
21 NDAs between XpertUniverse and any other company in the  
22 course of forming your opinions in this case?

23 A. I'm suggesting that I may have seen other NDAs, but I  
24 believe this is the only one I read in detail.

25 Q. Dr. Nourbakhsh, when we took your deposition in this

1 case, I asked you about NDAs and I said -- this is at Page 2  
2 '08, line 5:

3 "Did you review any other XpertUniverse" --  
4 strike that.

5 "Did you review any other NDAs to which  
6 XpertUniverse was a party other than the NDA between Cisco  
7 and XpertUniverse?

8 "Answer: I did not."

9 Dr. Nourbakhsh, we can skip tabs, the next two  
10 tabs in this binder.

11 THE COURT: I'm sorry. He didn't respond to  
12 your last question, I don't think.

13 THE WITNESS: I'm sorry. I think you're trying  
14 to somehow trap me and it's not true.

15 What you just asked me was, did I review any  
16 other NDAs, and I said this is the only one I looked at in  
17 detail.

18 You said did you see any other NDAs, and I  
19 said -- I said something very close to, this is the only one  
20 I read in detail. Then you read me back from my deposition  
21 with you, this is the only one you looked at in detail? I  
22 said no, I didn't review any others.

23 If your intention is to show that I secretly  
24 reviewed NDAs and then lied about it, I don't have any  
25 reason to misrepresent my looking at NDAs.

Nourbakhsh - cross

1                   The important point is, did XU take appropriate  
2           measures to maintain and preserve the confidentiality of  
3           their trade secrets which were their valuable, you know,  
4           part of their set of products, the set to evaluate the  
5           company, and I did what I needed to do to ensure myself  
6           that that question would be asked before proceeding with the  
7           case.

8           BY MR. SCHUMAN:

9           Q.     And I wasn't actually trying to suggest what you just  
10          said. I was just simply clarifying the record regarding  
11          what NDAs you reviewed in connection with your work in this  
12          case.

13                 Dr. Nourbakhsh, there are some other documents  
14          in this binder. You can skip the next two. Those are  
15          contracts.

16                 And I have the same question for you regarding  
17          each of the remaining nine documents in this binder, which  
18          is, did you review them in the course of your work in this  
19          case?

20          A.     Can you give me a tab number to go to?

21          Q.     Sure. Tab No. 23.

22          A.     The e-mail; right?

23          Q.     The document at tab 23.

24          A.     Oh, yes. I do remember seeing this e-mail, yes.

25          Q.     And why is this e-mail not listed on Exhibit, on the

Nourbakhsh - cross

1 documents considered list in your reports?

2 A. I don't know. I remember this idea of somebody  
3 writing to Ken and saying it was great meeting with you.

4 Q. Okay. And turn to the next one for me, Dr.  
5 Nourbakhsh.

6 A. 26?

7 Q. Yes, 26. This document, Dr. Nourbakhsh, I'm going to  
8 represent to you that none of these documents are identified  
9 on either of your documents considered list.

10 Did you review the tab, the document at tab 26  
11 in connection with your work in this case, your opinions in  
12 this case?

13 A. I remember it was a great meeting with you guys  
14 yesterday text on the document under the prior tab. I don't  
15 remember the space Ken and Vinnie. So it looks unlikely  
16 that I reviewed this one.

17 Q. Tab 27, Dr. Nourbakhsh, the same questions. This  
18 document is not listed on any of your documents considered  
19 list.

20 Did you analyze this document in connection with  
21 forming your opinions in this case?

22 A. Are we talking about the e-mail or the attachment or  
23 both together?

24 Q. The whole document.

25 A. Because in some cases the figures look familiar, but

1 the providence of the figures could be in other documents,  
2 you understand.

3 I don't think I reviewed this precise e-mail  
4 with the attachments as labeled tab 27, no.

5 Q. How about the same question regarding the document at  
6 31, tab 31? Did you review the documents here in connection  
7 with the forming of your opinions? And I will represent to  
8 you that this document is not listed on your documents  
9 considered list either.

10 A. This one looks familiar. The architectural diagram  
11 looks familiar, which the notes afterwards.

12 Q. But if you actually considered it in forming your  
13 opinions in this case, it would be listed on your documents  
14 considered list; right?

15 A. Yes.

16 Q. And the same question regarding tab 32, Dr.  
17 Nourbakhsh. Did you review this document in connection  
18 with forming your opinions in this case? I will represent  
19 to you that this is not on your documents considered list  
20 either.

21 A. No, I didn't review this one.

22 Q. The same question regarding the next document, Dr.  
23 Nourbakhsh, the one at tab 35. I will represent to you this  
24 document is not on your documents considered list.

25 Did you review and analyze this document in

1 connection with forming your opinions in this case?

2 A. No. This document does not look familiar. Oh, yes,  
3 it does, sorry. I just went to the second page. The e-mail  
4 wasn't looking familiar, but product function overview  
5 looked very familiar.

6 So I'm guessing at least terms of this document  
7 are identified perhaps by some other Bates number in some  
8 other documentation that I've seen.

9 Q. How about tab 36, Dr. Nourbakhsh? I will represent to  
10 you this is another document that is not on your documents  
11 considered list.

12 Did you review this document in connection with  
13 forming your opinions in this case?

14 A. I remember seeing the phrase "all documents are  
15 covered under NDA." I'm not sure it's this document or  
16 another one. And the reason I remember that phrase is  
17 because it reminds me of how we did business and the idea  
18 you have an NDA in place and from time to time you mention  
19 the DNA.

20 So I don't know this document or another  
21 document, but I do remember some document that I've seen  
22 that mentions the NDA as this one does.

23 Q. How about No. 39, Dr. Nourbakhsh? This document is  
24 another one that's not listed on any of your documents  
25 considered list.

Nourbakhsh - cross

1 Do you recall reviewing this document in  
2 connection with forming your opinions in this case?

3 A. I don't recall seeing this document, no.

4 Q. The last one, Dr. Nourbakhsh.

5 At tab 106, do you recall reviewing this  
6 document in connection with forming your opinions in this  
7 case? I will represent to you that this is not on either of  
8 your documents considered list.

9 A. Is the last one is one page e-mail; is that correct?

10 Q. One page e-mail, Dr. Nourbakhsh. And your binder,  
11 does your binder include the attachments?

12 A. Oh, so the --

13 Q. Yes. That's the document, Dr. Nourbakhsh.

14 A. Not the last page. I see. I see. Let me take a  
15 look.

16 Q. My question to you, so the record is clear, my  
17 question to you, the entire document, beginning at  
18 Bates Number Cisco 307179, an e-mail with PowerPoint  
19 attachments.

20 My question to you, my representation to you is  
21 this document is not identified on your documents considered  
22 list. My question to you is whether you considered this  
23 document in the course of forming your opinions in this  
24 case.

25 A. The slide set, in particular, the area on Bates

1 7181, prospects and the slide on Bates 7183 that talks  
2 about Cisco/IBM banking refresh look familiar, so in some  
3 slide set or presentation that I have reviewed, I have  
4 seen these slides. However, I'm not assured that I saw it  
5 in this exact format as an e-mail attachment, in other  
6 words.

7 MR. SCHUMAN: Just one more minute, your Honor.

8 THE COURT: All right.

9 BY MR. SCHUMAN:

10 Q. Dr. Nourbakhsh, in the course of your work in this  
11 case, you came up with a scale and purported to value  
12 XpertUniverse's, the trade secrets list on the XpertUniverse  
13 trade secret list?

14 A. That's right.

15 Q. And you communicated your valuing of those trade  
16 secrets to XpertUniverse's other expert, Mr. Braddock;  
17 right?

18 A. Well, I communicated them to -- to counsel and they  
19 passed it on to Braddock, I believe. I think that's the way  
20 it was used.

21 Q. So did you -- you didn't actually communicate  
22 directly with Mr. Braddock regarding your ranking of  
23 the trade secrets, your valuations of the trade  
24 secrets?

25 A. I think I always endeavored to have my communication

Nourbakhsh - cross

1 be with counsel and then they act like a facilitator. If I  
2 got that wrong, then that's a surprise to me.

3 Q. So turn, Dr. Nourbakhsh, in the big binder I gave you  
4 when we started today, tab 8 is Mr. Braddock's report, the  
5 big binder.

6 A. I'm going there.

7 Q. Okay. Tab 8 is Mr. Braddock's report. And if you go  
8 all the way towards the end, just like your report, his  
9 report has exhibits.

10 A. Yes.

11 Q. Exhibit 5?

12 A. Yes.

13 Q. Have you ever seen this document before, Exhibit 5 to  
14 Mr. Braddock's report?

15 A. I believe this is the same thing you showed me at  
16 deposition, isn't it?

17 Q. Was that the first time you ever saw the document?

18 A. It's the first time that I saw this finished document,  
19 yes.

20 Q. Okay. And the third column from the right, it says,  
21 value allocation.

22 Do you see that?

23 A. Yes.

24 Q. And there's a footnote? And if you go to the bottom  
25 of the next page, the footnote says, value allocation was

1 provided by Illih R. Nourbakhsh, Ph.D.

2 A. That's right.

3 Q. So does this column accurately represent, Dr.

4 Nourbakhsh, the valuations that you came up with for

5 XpertUniverse's trade secrets?

6 A. Yes. Mr. Braddock and company asked for some way of  
7 understanding trade secrets, and I decided to do that by  
8 essentially rank ordering and storing the importance of the  
9 trade secrets on a 0 to 10 scale, and I passed that on back.  
10 And I believe they used that to construct this table.

11 Q. Ten being the highest, of course, and zero being the  
12 lowest?

13 A. Yes.

14 Q. And, Dr. Nourbakhsh, tell me in the court what your  
15 valuation was for trade secret number 40. Can you find that  
16 on this document?

17 A. It was nine.

18 Q. Nine out of ten?

19 A. That's correct.

20 MR. SCHUMAN: I don't have any other questions  
21 for Dr. Nourbakhsh.

22 Thank you, your Honor.

23 THE COURT: Mr. Sobel, you have a few minutes to  
24 address whatever you would like to address. In fact, take  
25 as much time as you need.

Nourbakhsh - redirect

1 MR. SOBEL: Okay.

2 REDIRECT EXAMINATION

3 BY MR. SOBEL:

4 Q. Dr Nourbakhsh, Mr. Schuman asked you a series of  
5 questions about, I believe it went in this fashion. Did  
6 you inspect the final product of, for example, Expert  
7 Advisor? Did you inspect a working copy of Expert  
8 Advisor?

9 Did you use a copy of, a working copy of Expert  
10 Advisor? And he asked those same questions for several of  
11 the products.

12 Do you recall that?

13 A. Oh, of course, yes.

14 Q. Okay. Are you aware that XpertUniverse asked Cisco  
15 for copies of the accused products in this case?

16 A. I dimly recall that, yes.

17 Q. Are you aware that Cisco never produced working  
18 copies, working copies of the accused products in this  
19 case?

20 A. I remember that conversation with counsel, yes.

21 Q. And in that same fashion, that same series of  
22 questions regarding each of the products, Mr. Schuman asked  
23 you about customer deployments.

24 Are you aware whether XpertUniverse asked for  
25 information regarding customer deployments of Cisco and

1 Cisco did not produce it?

2 A. Yes. We had that discussion several times as well.

3 We wanted to know who was using it and had difficulty  
4 getting that information, and that seems to be a constantly  
5 changing story.

6 Q. All right. Now, let me ask you a question. In your  
7 expert opinion, is it necessary to use a product, working  
8 copy of a product to render the opinion, the opinions that  
9 you've given in this case?

10 A. The opinions that I'm giving in this case need me to  
11 understand the product. The question is, how can you best  
12 understand how the product works internally so you can match  
13 it to things like trade secrets or patents. It's a  
14 diversity of documentation from the database e-mail to the  
15 marketing requirement documents to the feature lists to the  
16 actual architectural specifications to the user's manual, of  
17 course, but much more importantly, the administration  
18 manual.

19 No one product, documents, will tell you  
20 everything about it because you have to pick and choose  
21 everything you like about it. Using a product can be  
22 useful, but if you get to use a product and all you see is  
23 the screen and you interact with the mouse, you certainly  
24 won't know what the database is, you won't know what the  
25 back end is like.

1                   Regardless of whether you use it or not, you  
2           have to use the documentation, and use your documentation as  
3           us clues to figure out how it actually works.

4                   So I would have loved to have used the product.  
5           However, I did the best research I did with the deposition I  
6           had, and I didn't formulate an opinion on anything where I  
7           didn't have enough information to know. I looked for the  
8           information I needed and then used what I had to write an  
9           opinion.

10                   So I got enough information from the documents  
11           to understand in my head how the product works.

12           Q.       Okay. And in your opinion, given your experience and  
13           your knowledge and your expertise, is it reliable to rely on  
14           documents that you considered in determining the  
15           functionality for each of the accused products?

16           A.       Yes, absolutely. It's a roadmap. The whole point of  
17           looking at intermediate stage documents like Expert, you  
18           know, feature lists, is that you have to get into the brains  
19           of the software engineers who made the product, and the  
20           only way to get there is not just look at final  
21           documentation. Ideally, look at the roadmap of  
22           documentation, understand how they thought it up, how they  
23           sold it inside the company, what are the features they told  
24           the company are valuable, because that gives you insight to  
25           what the features are and whether they've talked about it,

1 and then how they actually implemented it.

2 You have to look at everything over time to get  
3 the best possible view of the product.

4 Q. Now, Mr. Schuman suggested, I don't know if you caught  
5 it, that perhaps the documents that you were given were  
6 selected by Stroock and sent to you. But can you clarify  
7 for the record how you --

8 A. Yes. He said sent by Stroock twice and that's not  
9 fair. I -- I sat in the offices of Stroock and they brought  
10 box upon box of everything they had collected from Cisco,  
11 and it was a very large number of boxes. I spent an entire  
12 day doing just this and I went through everything, making  
13 two piles, things that are relevant, things that are very  
14 relevant. Even things in the relevant pile I had 12  
15 different versions of the same manual, six different Bates  
16 numbers of the same object.

17 So I had to go through those and decide which  
18 ones of them am I going to take with me. All of those boxes  
19 you shipped that to me in Pittsburgh. I'm the one that made  
20 the choices from the boxes that you had to what actually  
21 went to Pittsburgh with me.

22 Q. Okay. Now, Mr. Schuman asked you some questions and I  
23 think he showed you a videotape from your deposition about,  
24 he was talking about the product Pulse and he was talking  
25 about a user guide and administrative guide and we had some

1 back and forth there.

2 I just want to clarify the record because he  
3 was -- he asked you a question, you know, whether you had  
4 reviewed this.

5 And can you explain whether or not you -- well,  
6 let me ask you this. At the time at the deposition, did you  
7 recognize the user guide and administrative guide that he  
8 put in front of you?

9 A. I didn't recognize them at the time of the deposition.  
10 Mr. Schuman was presenting, he wasn't letting me look at my  
11 write-up, so I couldn't refer to my write-up for the first  
12 two depositions. I was supposed to do it from memory.

13 He presented me with the document that had the  
14 appendices in it but wouldn't let me look through it. He  
15 went through certain pages quickly. I didn't have a chance  
16 to recognize anything in terms of context, except when I  
17 said let me look for context. The truth of the matter as it  
18 stands is that the Pulse opinion that I have depends on the  
19 things that I referenced.

20 It is true that the exhibit on a separate  
21 testimony that I looked at include the user's manual  
22 guide. It is true therefore that I saw it. It's also  
23 true that after the deposition I went back and realized,  
24 my goodness, what he showed me was exactly what he was  
25 asking me about. And I read them carefully and I was happy

1 to see in reading them, it didn't change my opinion about  
2 Pulse. That's the end of the story in terms of those two  
3 documents.

4 I then remind you that the user's guide and  
5 administrative guide are important, but I have a very large  
6 number of documents in my Pulse section that I refer to.  
7 And there was enough documentation of a variety of kinds for  
8 me to draw a reasonable conclusion.

9 Q. And nothing in those guides contradicted anything  
10 regarding your opinion; right?

11 A. That's correct.

12 (Pause.)

13 BY MR. SOBEL:

14 Q. Now, let me put in front of you a document that was  
15 Bates labeled 382951, Spreadsheet.

16 A. Yes.

17 Q. And Mr. Schuman asked you quite lengthy questions  
18 about this. I just want to clarify the record.

19 This isn't the only document that you relied on  
20 to form your opinion; right?

21 A. Of course not. It's one of many.

22 Q. All right. And before when you were talking about  
23 what was the most important documentation regarding the  
24 functionality of the product to determine the functionality,  
25 did you have that documentation from RemoteXpert?

1 A. Yes. I had everything that I needed from RemoteXpert.

2 If I recall correctly, RemoteXpert was a really  
3 good one. We had a whole list of documents that helped me  
4 understand functionality.

5 Q. I think you clarified this, but, you know, Mr. Schuman  
6 was asking you questions about, and he showed you  
7 Mr. Lepore's testimony, and -- well, let me ask.

8 All right. And he said at the end of his  
9 testimony, he said he had a bunch of features that are not  
10 available to use the different IBR. I think we may have  
11 restricted it only to CVP.

12 Now, again, when you took that testimony into  
13 account and comparing that with what you reviewed, did  
14 you see anything in that testimony that changes your  
15 opinion?

16 A. I explicitly took that into account. I even  
17 referenced it in one of my remote reports. It is a  
18 troubling piece of testimony. It suggests that a specific  
19 kind of IBR was used as a divider.

20 My response is that there's a semantic game  
21 going on here, that there's a way to think about Expert  
22 Advisor and the standalone thing with IBR only, but all the  
23 documentation I saw from Expert Management and all the  
24 documentation I've seen for UCCE, which is their backbone  
25 product, suggests that Expert Advisor is built into it, part

1 and parcel with it. So in my opinion, I have to discount  
2 that testimony in light of everything else I saw leading me  
3 to believe there's a graphical interface at the time of the  
4 report for Expert Advisor in those cases.

5 Q. Okay. I will ask you a product of the limitation  
6 patent, the unique numerical routing identifier. Does using  
7 a product establish whether or not it was using a unique  
8 numerical routing identifier?

9 A. I don't think I understand the question.

10 Q. Okay. Do you remember the line of testimony about the  
11 unique routing identifier?

12 A. Yes. Okay.

13 Q. My question is, does using the end product tell us  
14 whether the end product uses a unique numerical routing  
15 identifier?

16 A. If a product is usable, it has to have some type of  
17 identifier in the case of that particular element that you  
18 are talking about. The element requires a way for the  
19 computer system to get to the inquiry types. So that means  
20 somewhere there has to be an index that points to the  
21 inquiry types, balance of the inquiry types. That's a fact  
22 of matter in computer science. You can't guess where it is.  
23 You have to have a directory that tells you where to go. In  
24 that sense, any product that's usable has that.

25 Q. And where would you look to determine whether that is

1 the case? How do you determine that?

2 A. I would look in database calls, in tables. I would  
3 look in -- in any markup language that's used when you're  
4 presenting things to the screen because that's a nice place  
5 where they have to go get the values to stick on the screen  
6 for you.

7 Q. And you don't need to use the product to determine  
8 whether the product is using the unique numerical routing  
9 identifier?

10 A. I don't need to use the product. I simply need access  
11 to information about the product.

12 Q. Okay. Mr. Schuman asked you a bunch of questions when  
13 he was going through the limitations. I don't know if you  
14 caught it, but he was asking you about limitation.

15 He said, is this a novel element. And I just  
16 wanted to -- when you were agreeing with him, were you  
17 agreeing with him that that was an element of the  
18 limitation, or were you making a separate opinion that just  
19 that one element, you know, made the whole patent, the whole  
20 claim novel?

21 THE COURT: I don't think that was actually --  
22 if that was in the question, it's irrelevant to me.

23 MR. SOBEL: Okay. I just wanted to make sure it  
24 doesn't come back later.

25 (Pause.)

1 BY MR. SOBEL:

2 Q. I just wanted to also clarify for the record, do you  
3 remember Mr. Schuman showing you some testimony from your  
4 deposition? It was in the context of Virtual Expert  
5 Management and Expert Advisor, and he asked you -- he read  
6 from your deposition.

7 A. Yes.

8 Q. He read a you a point on page 35, line 16.

9 Are you aware that Expert Advisor was released  
10 by Cisco and actually sold separately from Virtual Expert  
11 Management?

12 And then you said yes.

13 And then, you know, could you just explain, you  
14 know, your understanding so that the record is clear on that  
15 point?

16 A. Yes. Tell me the page number again so I can get to  
17 it, please.

18 Q. Page 135, line 16.

19 A. I'm trying to figure out what tab to go to first.

20 Q. Oh.

21 A. There we go. Page 135?

22 Q. Yes. My question is simply, is that consistent  
23 with what your testimony was right before he read that to  
24 you?

25 A. Yes. I'm -- I'm trying to be consistent. It is the

1 case that there was a thing by Cisco called Expert Advisor.  
2 My concern is that I believe architecturally from what I've  
3 seen about Virtual Expert Management and UCCE, that,  
4 in fact, Expert Advisor is really part of a larger product.  
5 And so one can say things like, oh, we don't sell it. Maybe  
6 it's okay to say that because you're not really selling it,  
7 you're selling this other package that happens to include  
8 Expert Advisor.

9 So I think it's a game of language. Do I  
10 believe that Expert Advisor and Virtual Experiment  
11 Management are important in this case? Yes.

12 Q. Okay. Just a final -- I just want to make clear  
13 whether you felt that you had all of the information and  
14 documentation necessary for you to, as an expert, render the  
15 opinions that you did in your reports on product.

16 A. Yes, but my reports are, as I said this before,  
17 they're the opinions that I feel good about supporting and  
18 believing in given all the documentation I had.

19 I didn't propose any opinions that I had factual  
20 support for, therefore the opinion is wavering. Those are  
21 not the opinions I provided.

22 If you look in the Excel sheets, you'll see on  
23 every single product, I didn't go through and say bang,  
24 bang, bang, bang, every product is hitting every trade  
25 secret. It's real opinion. I've actually gone and looked

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1 for support on everything and I only rendered the opinion I  
2 truly believed in.

3 MR. SOBEL: Thank you, Dr Nourbakhsh.

4 THE COURT: All right. Thank you, Mr. Sobel.

5 Dr. Nourbakhsh, I just want to make sure that I  
6 understand, which is, is it your opinion that Home Depot  
7 uses RemoteXpert in such a way that Home Depot infringes  
8 claim 1 of the '903 patent?

9 THE WITNESS: Yes. What they are doing causes  
10 them to infringe it, yes.

11 THE COURT: All right. Okay.

12 All right. Thank you. You may step down.

13 THE WITNESS: Thank you.

14 (Witness excused.)

15 THE COURT: All right. Why don't we do this.

16 Why don't I just hear, since it's your motion, Mr. Schuman,  
17 do you want to spend three or four minutes and tell me what  
18 you think you have proved here, if anything?

19 And then, Mr. Sobel, I will give you a chance to  
20 respond to what he says.

21 MR. SCHUMAN: I think what we established here,  
22 your Honor, is far methodology, contrary to the objection we  
23 heard.

24 With respect to the trade secret opinion, Dr.

25 Nourbakhsh started from what we have contended is an

1       improper list of concepts, high level concepts, and  
2       purported to map them to documentation he received regarding  
3       Cisco's products. I will not repeat the argument we had the  
4       other day regarding all the problems with the list, but  
5       obviously the starting place from our perspective for that  
6       entire analysis is improper.

7               There's one other very fundamental problem with  
8       his mapping analysis, which I think was very clearly stated  
9       today during the testimony.

10              Dr. Nourbakhsh is essentially claim charting  
11       these trade secrets to the products. There's a fundamental  
12       difference here between patents and trade secrets.

13              Patents you can chart that way. All you have to  
14       do, as your Honor said the other day, is strict liability.  
15       All you have to do is find those claim elements in the  
16       patent claims in the products and you've got patent  
17       infringement. Not so for trade secrets.

18              Mapping or claim charting a language in a  
19       document like XU's trade secret disclosure to functionality  
20       you can find in the documents doesn't even get you to first  
21       base for trade secret misappropriation because you have to  
22       find evidence that the defendant actually used their, the  
23       trade secrets in some way that violates the trade secret  
24       statute.

25              THE COURT: Well, maybe it doesn't get you to

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1 first base, but it gets you away from home plate, doesn't  
2 it?

3 MR. SCHUMAN: That's a little metaphysical for  
4 me, but it might get you past home plate, but it doesn't  
5 get you to first base, your Honor, because of the case  
6 law we cited in our Daubert motion, including Agency  
7 Solutions versus Trizetto Group, and Sovaco (phonetic)  
8 versus Intel.

9 For purposes of California's trade secret law,  
10 the mere fact that some product, accused product embodies a  
11 trade secret, even if you accept the mapping analysis.

12 THE COURT: But that's the thing. That's the  
13 reason why I say it gets you somewhere because if it  
14 embodies the trade secret, then you get these other things  
15 used, disclosed, whatever.

16 MR. SCHUMAN: Right. And this is briefed, but  
17 did not come up during the testimony today that I  
18 actually -- the deposition was clarification between mapping  
19 and use.

20 And I asked Dr. Nourbakhsh at his deposition,  
21 it's in the briefing, in all of your analysis of these  
22 documents, from the initial development document to the end,  
23 did you find any reference to any XpertUniverse documents?  
24 And the answer was no.

25 And I think what we established here today also

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1 is that with respect to the nine documents that we, Cisco,  
2 would agree were marked confidential and transmitted by XU  
3 to Cisco, none of those documents are the basis for Dr.  
4 Nourakhsh's opinions, and there is no evidence, your Honor,  
5 that any of those documents or any of the confidential  
6 information that might be embodied in those documents were  
7 used in the development of any of these products.

8 That's my summation with respect to the trade  
9 secret opinions.

10 With respect to the patent opinions, I think  
11 there are a couple of problems. I obviously think that the  
12 level of analysis here, reviewing pieces -- I think actually  
13 Dr. Nourbakhsh said it better than I could. A diversity of  
14 materials.

15 And what Dr. Nourbakhsh did is for certain  
16 elements he would refer to -- let me take a half a step  
17 back. I think we all appreciate that the development of  
18 software product can be a long process and different  
19 documents are created along the way.

20 And every document that is created along the  
21 way from that beginning customer survey that Dr. Nourbakhsh  
22 referred to, whether we agree or disagree that the document  
23 that I showed Dr. Nourbakhsh is such a customer survey,  
24 we have at the front end of the development process a  
25 set of expectations, what would we want this product to

1 include.

2 And then what the development process does is  
3 they come up with something called a functional  
4 specification, again, a high level description of what we  
5 want this product to do.

6 And then the real work begins in terms of  
7 reducing that to actual software, and anywhere along the  
8 spectrum there ideas get raised and ideas get dropped out.  
9 It's like making a movie, your Honor. You shoot 200 hours  
10 or more of film and most of it winds up on the cutting room  
11 floor because the movie you wind up with has to be two  
12 hours.

13 It's the same thing with a software development  
14 process, your Honor, and the fundamental methodological  
15 problem with Dr. Nourakhsh's analysis, and I think we've  
16 established this, is that for at least one element, and I  
17 think that's sufficient for purposes of our motion, but for  
18 at least one element of each of these patent opinions, we've  
19 identified some document that he relied on that does not  
20 reflect the functionality of the final product.

21 He's not looking at the movie, which is the only  
22 thing that can infringe -- you know, my metaphor breaks down  
23 a little bit, but it's the final movie is the thing that is  
24 accused of patent infringement.

25 And what he has effectively done is created

1 products that don't even exist because the actual release  
2 product and the product that's used by the customers is not  
3 the one that includes that query engine that he relies on  
4 solely, according to his report for purposes of meeting one  
5 of the elements of the claim.

6 So our position is that with respect to the  
7 patent opinion, it's a methodological flaw.

8 And the last point is with regard to indirect  
9 infringement, and I think we also establish, your Honor, I  
10 think this is absolutely clear on the record, that his  
11 indirect infringement opinions are wholly conclusory. G.E.  
12 versus Joiner, ipse dixit on an expert is not sufficient  
13 evidence to overcome a Daubert motion.

14 In each of his indirect infringement opinions,  
15 your Honor, this is paragraphs 96, 111, 146, and 208 of  
16 Dr. Nourakhsh's opening report, they are verbatim the  
17 same.

18 In my opinion, any customer using this product  
19 is going to infringe, is going to be the direct infringers.  
20 That's my interpretation. It's a longer paragraph. Each  
21 one of those paragraphs says the same thing. As we heard  
22 today, without any analysis whatsoever of how any customer  
23 actually deploys a product and notwithstanding Dr.  
24 Nourakhsh's conclusory opinion, these are software products  
25 with lots of optional functionality. A black list is

1 clearly optional functionality and that is the sole basis  
2 for his opinion that one of the other elements of the '709  
3 patent is met with respect to Pulse.

4 And, your Honor you can't do that. You can't do  
5 that. You can't speculate as to how the direct infringer  
6 will use the product. This is not the same thing as not  
7 being able to actually identify the direct infringer, this  
8 is configurable, optional technology in a software product,  
9 and you have to know how the direct infringer is actually  
10 using it in order to have an indirect infringement claim  
11 against the manufacturer, provider of the software, and  
12 that's the Mirror World versus Apple case, among many  
13 others.

14 THE COURT: If I were to agree with you on that,  
15 would that mean that there would still be direct  
16 infringement claims here for let's say SOAR. Right?

17 MR. SCHUMAN: There are no patent claims against  
18 SOAR, your Honor.

19 THE COURT: Is that right?

20 MR. SCHUMAN: Yes.

21 THE COURT: Okay. All right. Thank you.  
22 Actually, then, are there direct infringement claims?

23 MR. SCHUMAN: There are direct infringement  
24 claims, yes. And so the point I was just making, your  
25 Honor, is with respect to the indirect infringement

1 theories, in my opinion there's -- those all have to go  
2 because there's no -- I take that back. Sorry.

3 The argument I was just making was specifically  
4 with regard to the indirect infringement theories.

5 THE COURT: Right.

6 MR. SCHUMAN: And also, your Honor, and this is  
7 explained in our brief, method claims as well. Method  
8 claims, you have to find a user that actually practices all  
9 the steps.

10 THE COURT: That's why I asked about SOAR. I  
11 thought the actual claims, that Cisco practiced the steps.  
12 But if SOAR is not accused --

13 MR. SCHUMAN: SOAR is not accused of patent  
14 infringement. I think your Honor is referring to the fact  
15 in the opposition brief here, there was a statement that,  
16 well, at a minimum we have direct infringement because Cisco  
17 must have practiced these inventions in the course of  
18 developing the product, but there is no evidence on that,  
19 your Honor. There was no discovery conducted, and, of  
20 course, that wouldn't lead to any significant damages. It  
21 is a theoretical possibility that in the R&D process,  
22 somebody can infringe a method claim.

23 THE COURT: But all the -- I mean, the \$2  
24 million in sales of these various products, they were all  
25 sales that would lead to these other people doing -- I mean,

1 would lead to indirect infringement claims?

2 MR. SCHUMAN: Correct, your Honor. That is  
3 absolutely correct. And with respect to Virtual Expert  
4 Management, there are zero sales.

5 With respect to Expert Advisor, this was  
6 suggested by my questions, but the evidence is actually in  
7 the record. I think that's about \$300,000 in sales and over  
8 50 percent of them were outside the U.S., to customers in  
9 Australia, Mexico and elsewhere, and that raises a whole  
10 other set of issues with regard to damages.

11 Pulse is the other product that's accused.  
12 Those were all discontinued products, by the way, your  
13 Honor.

14 THE COURT: Right. Right. Right. I remember.

15 MR. SCHUMAN: Okay?

16 THE COURT: Okay.

17 MR. SCHUMAN: Thank you, your Honor.

18 THE COURT: All right. Mr. Sobel?

19 MR. SOBEL: One thing I agree with Mr. Schuman  
20 on is there a fundamental difference between a trade secret  
21 and misappropriation case and a patent case and the  
22 difference lies in what it means to use a trade secret.

23 Use has a very -- the operative definition of  
24 use for the California Trade Secret Act comes from the third  
25 restatement of unfair competition, Section 40, Comment C.

1 And I will read to you from there.

2 It says there's no technical limitations on the  
3 nature of the conduct that constitutes use of a trade  
4 secret. As a general matter, any exploitation of a trade  
5 secret that is likely to result in injury to the trade  
6 secret owner or enrichment defendant is use.

7 It goes on and says, thus, marketing goods and  
8 body of the trade secret, employing the trade secret in  
9 manufacturing or production, relying on the trade secret to  
10 assist or accelerate research or development or soliciting  
11 customers for the use of information that is a trade secret  
12 all constitute use.

13 And it further importantly says, the  
14 unauthorized use need not extend to every aspect or feature  
15 of a trade secret. Use of any substantial portion is  
16 sufficient subject to the act or liability.

17 And it also goes on to demonstrate that, you  
18 know, showing similarities between the trade secret and what  
19 the -- what the other party has done is enough for the jury  
20 to conclude that there was a use of a trade secret.

21 This is a very different standard than we have  
22 in patent law where you have to have the product has to  
23 embody every limitation of the patent. The standard for use  
24 of the trade secret is very minimal. If they used it in  
25 development of the product, that is a use under the Trade

1 Secret Act.

2 The cases that they cited you to in their briefs  
3 are completely inapposite here. The first one he mentioned  
4 was Agency Solutions. The issue in the Agency Solutions  
5 case was a preliminary injunction because the person who  
6 wanted the preliminary injunction wanted -- allegedly had a  
7 trade secret and they wanted to control dissemination of a  
8 product. They didn't want the product out. And they were  
9 making that allegation based on the fact that they can  
10 control that product because they had a trade secret.

11 And so the question before the Court was not  
12 whether there was really a use under -- under the definition  
13 of use, but really limited to whether that product that was  
14 going -- that they sought to control would disclose the  
15 trade secret to, by being out in the market, to the public.

16 So that was a very different -- very different  
17 issue. And, by the way, that case also cites to the  
18 restatement, acknowledging that it is the operative  
19 definition of use, which makes sense, because the California  
20 Trade Secret Act, when it was enacted, didn't provide a  
21 separate definition for use, and it didn't supplant what  
22 was the definition of use from the -- before that, the  
23 common law from California. And the case -- another case  
24 confirming that more recently is the PNC, Inc. V. Kadeshia,  
25 93 California Recorder, 2D.663.

1           The other case was Savaco. And what the Court  
2       said in Savaco was -- this is what they analogized it to.  
3       They said if I order a piece of pie at a restaurant and I  
4       eat that pie, just because that pie might have been made  
5       with a trade secret formula, me, the eater, the customer at  
6       the diner, I have not used the trade secret.

7           And that was the issue there because it was a  
8       question of, I believe Intel, but I don't have it in front  
9       of me. I think it was Intel, but, in any case, a party  
10      got software, and the question was, the software was  
11      developed with the trade secret, and where the party who  
12      received that, so if it was using that software, like the  
13      person at the diner eating the pie, were they using the  
14      trade secret. So these cases have no applicability here.

15           And it dovetails with the point. Now, I will  
16      make the point again that we requested access to the end  
17      product and Cisco said no in discovery. So they didn't  
18      provide us those products. But for the trade secret, it  
19      doesn't even matter. We'll get to the patents in a second,  
20      because you only need to show that it was used at some point  
21      in the process of development. You don't need to show that  
22      it was used in the end product to demonstrate the use of a  
23      trade secret.

24           So if they relied on it in the research and  
25      development, it helped accelerate the development, that's

1 sufficient to constitute use.

2 Now, on the mapping, I really don't understand  
3 the controversy on the mapping. It's clear from his  
4 opinion, his report, that he -- his opinion is Cisco used  
5 the trade secrets and that's the whole exercise on the map.  
6 He confirmed that as far back as I think early December, and  
7 I think it's clear what he did there.

8 Now, what Mr. Schuman said with those nine  
9 documents, that's a little bit of a different issue.

10 See, Dr. Nourakhsh's testimony starts from the  
11 point of there are trade secrets and says, can you -- can  
12 you look at Cisco and the documentation, the evidence they  
13 provide in discovery, to determine in your opinion whether  
14 it was used, and in the case of the patents, whether it was  
15 disclosed. But there are separate witnesses whose job it  
16 is to establish that they shared the trade secret with  
17 Cisco.

18 THE COURT: No. That's kind of I imagine Dr.  
19 Nourakhsh's testimony complementing other testimony.

20 MR. SOBEL: Right. So it's not that he was  
21 saying he was there in these meetings and he saw the e-mail  
22 at the time and he tracked, you know, that Cisco -- he's  
23 coming in saying, where is the evidence? And he's making an  
24 opinion as an expert that, you know, this is the evidence  
25 where it turns up.

1                   And why that's important is because, again,  
2           under the restatement, although -- I'm quoting. Although  
3           the trade secret owner -- this is from the definition of  
4           use. Although the trade secret owner bears the burden of  
5           proving unauthorized use, proof of the defendant's knowledge  
6           of the trade secret together with substantial similarities  
7           between the parties' products or processes may justify an  
8           inference of use by the defendant.

9                   So that's setting forth that you show the  
10          similarities, you show their knowledge, and that a jury can  
11          conclude based on the evidence, that's sufficient evidence  
12          to conclude misappropriation. Okay.

13                  So going to the patents, again, they make this  
14          point with not using the final product. I'm not going to  
15          restate the fact that they have not provided that even  
16          though it was requested.

17                  I'm sorry. I did restate that. But the point  
18          here is that Dr. Nourbakhsh is an expert.

19                  THE COURT: By the way, I mean, whatever  
20          happens, the jury is not going to hear, we didn't get what  
21          we wanted. Right?

22                  MR. SOBEL: Right.

23                  THE COURT: Right? Okay. I am just making  
24          sure.

25                  MR. SOBEL: It makes the point that, you know,

1       you don't give it to him and then you criticize him for not  
2       looking at it.

3               THE COURT:  No, no, no.  I don't think that's  
4       actually right either.  I mean, you look at it as he has  
5       what he has.  That's kind of just given.  How we got there,  
6       that's kind of in the black box.  We don't care about that  
7       anymore.

8               So he has what he has.  Here's what he has.  You  
9       know, a proper methodology to use what he has and, in some  
10      sense, you know, I would say is, you know, how reliable is  
11      it?  That's what you are getting at.

12              MR. SOBEL:  That's exactly right.  And the point  
13      is here that Dr. Nourbakhsh is an expert in this field, and  
14      he -- he testified under oath as an expert.  He considers  
15      the documentation that he relies on for his opinion is  
16      reliable to determine the functionality of those end  
17      products and is the most reliable pieces of evidence.

18              THE COURT:  I didn't hear him say it was the  
19      most reliable.

20              MR. SOBEL:  Well, I have to look at the gist of  
21      what I got from that --

22              THE COURT:  I mean because you would agree that  
23      most reliable of the Home Depot question would be to go to  
24      Home Depot and check out whatever is actually in use there,  
25      including getting into the back operations.  I mean, I'm not

1 saying this was something that could have done, but if you  
2 really wanted to know what Home Depot was doing, that's what  
3 you would do. Right?

4 MR. SOBEL: Let me just confer.

5 (Pause.)

6 MR. SOBEL: Okay. I think the point is that in  
7 certain cases, you know, what you are saying, you know,  
8 might be true, but if you heard his testimony, what he said  
9 was that you don't need to know whether certain things are  
10 going on in the product or if the product requires  
11 necessarily using these limitations. You don't need to look  
12 at Home Depot when you look at the product and you see that  
13 that is what the product is doing.

14 THE COURT: Well, and so Mr. Schuman asked about  
15 black list. You asked about unique rooting numerical  
16 identifiers, which maybe I dozed off, I hadn't heard him  
17 bring up. You know, I mean I think if the issue is there  
18 are some things which would seem clear that if you didn't  
19 have them -- whatever package of stuff is being sold, that  
20 if you didn't have that functionality, then you wouldn't  
21 have the product. There are other things that seem a little  
22 bit more optional to whether it can be useful.

23 I mean, Home Depot, I may have gotten my  
24 products mixed up here, but Home Depot may not have the same  
25 kinds of needs as the U.S. military in terms of having a

1 black list. I mean, you know, we've got hammers, we've got  
2 nails. I'm not sure that you can't have the lowest clerk on  
3 the floor know that.

4 MR. SOBEL: Well, I mean, I heard his testimony  
5 as he was -- he's looking at the products, and the products,  
6 where they are ultimately end up in the customers' hands.  
7 They are the same products that he has evaluated in his  
8 opinion, reliable documentation for what is the end  
9 functionality in the product.

10 THE COURT: Well, no. That would be why his  
11 opinion would carry some weight, is if he says, you know --  
12 if he says everything that I looked at I can tell what the  
13 bank or insurance company, Home Depot was given, you know,  
14 that seems to me that's exactly what an expert could say.

15 You know, the Cisco objection is, well, some of  
16 the stuff he looked at was not the final version of even our  
17 stuff and so that's perhaps an issue.

18 But then the other Cisco objection, which is --  
19 you know, whether he looked at the right stuff or not, that  
20 does seem like an argument for a jury. Whether -- whether  
21 you can infer from -- and, to some extent, I think whether  
22 an expert can say, and I do accept obviously that he is  
23 quite an expert in this field -- whether an expert can say a  
24 particular product, you know -- you know, I have an iPhone  
25 that has an airplane mode. I buy the iPhone and the

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1 airplane mode infringes some patent. It probably does. Who  
2 knows?

3 But I can turn it off, and if I turn it off,  
4 I've still got a perfectly good iPhone, and I'm not --  
5 you know, it's a method patent. I'm not infringing the  
6 method patents.

7 MR. SOBEL: Yes.

8 THE COURT: And maybe the iPhone, which was a  
9 completely different field from what Dr. Nourbakhsh is  
10 talking about. You know, I don't know. I would be inclined  
11 to believe that if Apple sells a million of these things and  
12 they all have airplane mode, they probably have some basis  
13 for letting people actually use it, you know. And I gather  
14 to some extent that's what Dr. Nourbakhsh is saying in a  
15 much smaller set of customers, that they've got customer  
16 charts, you know, solution requirements where people want  
17 this stuff. Then when they get it, they're going to use it.

18 MR. SOBEL: I mean, I think -- well, I mean you  
19 have to ask him this question, first off. But what I did  
20 hear him say, a number of things, is that while it is  
21 circumstantial evidence --

22 THE COURT: I think that's definitely  
23 circumstantial.

24 MR. SOBEL: And, by the way, the Federal  
25 Circuit, they say it in the Mirror World case that Mr.

1 Schuman cited to you, says circumstantial evidence is  
2 sufficient.

3 THE COURT: I'm going to tell the jury that from  
4 the first get-go.

5 MR. SOBEL: Excuse me?

6 THE COURT: I'm going to tell the jury that.

7 MR. SOBEL: You know, so if the evidence he puts  
8 forth is it's circumstantial, I looked at this and this is  
9 necessarily going to happen, you know. And it's his opinion  
10 then, that's sufficient for the jury, that's useful for the  
11 jury to hear, because it is one of the questions that they  
12 have to answer.

13 And they're capable of cross-examining him and  
14 bringing out the points of, well, he doesn't have the direct  
15 evidence of this or doesn't have the direct evidence, so all  
16 he has is that. That's a perfectly fair point for  
17 cross-examination.

18 THE COURT: Well, no, and you're right, and I  
19 guess the thing I'm going to have to think about a little  
20 bit is just, you know, there's a minimum threshold to get to  
21 before things get to be cross-examination questions, and so  
22 I think I understand what the issue is there.

23 What else do you have?

24 MR. SOBEL: Just give me one moment, your Honor.  
25 Thank you.

1 (Pause.)

2 MR. SOBEL: I will just confer with my  
3 co-counsel.

4 That's it. Thank you.

5 THE COURT: All right. Okay. Well, I will take  
6 that under advisement. I know it's late, but there are a  
7 couple other things that we need to talk about.

8 Just following up, okay. A couple things.

9 The motion to amend that you have to include the  
10 concealment theory on the fraud, I looked at the pretrial  
11 order. Both sides have set out as a factual dispute. I  
12 don't think there's any prejudice to Cisco going forward  
13 with that, so I'm going to let you -- we're going to deem it  
14 amended to include that fraud theory.

15 On the unconscionability, when I was talking  
16 about that on Wednesday, I asked you about that. The first  
17 time I asked you about it, Mr. Cantine said I have a bench  
18 memo, and later on he said, no, I don't, which means that we  
19 didn't actually hit the ball very much because I still don't  
20 know the answer to the question of whether I have everything  
21 I need in order to decide that.

22 MR. SOBEL: I will address it, your Honor.

23 I think --

24 THE COURT: Do I have everything I need to  
25 decide that?

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1 MR. SOBEL: Yes.

2 THE COURT: Yes. Okay. Thank you.

3 All right. So the other two things that I've  
4 got here, one is just kind of generally the scheduling  
5 issues, and the other is this letter that I got from  
6 Mr. Blumenfeld, I guess, this morning, which is Docket Item  
7 610, which says -- since Mr. Blumenfeld is not here, Ms.  
8 Scher is not here, Mr. McCraw is not here, I'm kind of  
9 imagining the basis for an intelligent discussion of that  
10 letter is probably not present in the courtroom?

11 MR. SCHUMAN: Your Honor, I'm able to discuss  
12 it, and actually the reason why we filed a declaration is to  
13 try to advance intelligent discussion rather than having a  
14 bunch of attorneys talking about metadata fields and things  
15 like that, but I will defer discussion on that until  
16 Tuesday, when we'll be back here on the issues that that  
17 pertains to.

18 THE COURT: I was wondering why Ms. Scher and  
19 Mr. McCraw weren't here is because they've talked to each  
20 other about the topic.

21 MR. SCHUMAN: They've talked to each other quite  
22 a bit about the topic. We thought there was an agreement  
23 regarding the particular metadata fields that would need to  
24 be provided in order for us to ascertain whether these  
25 documents are what they purport to be, and the declaration

1       you received is that we did not receive that metadata.

2               THE COURT: No. I saw that, and so I actually  
3       read that as being -- and I will give you a chance, Mr.  
4       Cantine, if you want to say something.

5               I actually thought that Ms. Scher and Mr. McCraw  
6       had understood each other, which I still think the evidence  
7       seems to me that they did. But that what I was wondering,  
8       which I couldn't tell from the affidavit or declaration, was  
9       whether having, in essence, discovery of these things were  
10      not to Cisco's satisfaction, whether there had been, you  
11      know, discussion, or whether, in fact, you all were at an  
12      impasse.

13              MR. CANTINE: I think, your Honor, let me speak  
14      to that.

15              MR. SCHUMAN: I think we're at an impasse.  
16      There was a lot of discussion.

17              THE COURT: Let Mr. Cantine have a chance  
18      here.

19              MR. CANTINE: Thank you. Appreciate that.

20              I'm not so sure we're at an impasse. I saw a  
21      12-page letter was filed this morning. I didn't really have  
22      time to read it. The agreement was we're going to give them  
23      some sort of metadata. My understanding is we gave them the  
24      metadata. We gave it to them twice and they are saying it's  
25      not there.

1 THE COURT: All right. Well, I guess we're not  
2 going to get far here. I'm sorry. I didn't mean that the  
3 way it sounded, Mr. Cantine.

4 What I was wondering is, the metadata issue is  
5 in relation to these 52 e-mails. Right?

6 MR. CANTINE: I think it's for everything,  
7 what they're asking for, the documents and the e-mail. I  
8 think it's more for the documents, if I understand it  
9 correctly.

10 THE COURT: Well, there was an attachment to the  
11 declaration that included an Excel spreadsheet that had 52  
12 listed --

13 MR. CANTINE: Those would be the documents.  
14 Remember we had 52 documents?

15 THE COURT: Documents, not e-mails.

16 MR. CANTINE: Correct.

17 THE COURT: Okay. Okay. And the representation  
18 is that, Mr. Cantine, your team, and perhaps your expert,  
19 whose name I can't quite recall --

20 MR. CANTINE: Mr. Harris. Mr. Harris.

21 THE COURT: Harris were saying here's the 52  
22 documents he recovered.

23 MR. CANTINE: The 52 documents he found --

24 THE COURT: Found.

25 MR. CANTINE: -- which we think are the same

1       ones they've been looking for.

2                   THE COURT:   And so I understand generally why  
3       people want metadata with various things.   But why is it --  
4       and I understand there may be an agreement between the  
5       parties here.

6                   But, Mr. Schuman, what is it that the metadata  
7       here does for you?

8                   MR. SCHUMAN:   The metadata shows whether the  
9       documents that they produced actually came from  
10      Mr. Friedman's computer or not.

11                  THE COURT:   Well, I'm taking Mr. Cantine and his  
12      team's word that it does, in fact, come from the computer.  
13      Right?

14                  MR. CANTINE:   I can't believe I'm hearing this,  
15      yes.   Mr. Harris took them from the image of Mr. Friedman's  
16      computer.   To suggest they came from somewhere else is a  
17      little crazy.

18                  THE COURT:   Yes.   So, you know, I don't mean  
19      to -- you know, I was trying when I did that order to  
20      advance the ball.   We're all trying to advance the ball one  
21      way or another, but trying to advance the ball as to whether  
22      there was something important that had disappeared.   And  
23      I've got -- but for that purpose, I don't care whether it  
24      has metadata or not, because Mr. Cantine is saying this is  
25      what he recovered, these 52 things.

1 I guess when you or your team was talking about  
2 metadata the other day, I thought maybe that was going to  
3 help you match that up against stuff you already had even  
4 though in the order I kind of imagine that it's a new -- if  
5 it was stuff he already had, he was going to supply the  
6 Bates numbers on -- kind of a 20th Century person here.

7 And so other than questioning -- I don't know a  
8 nice way to put this, but other than questioning the  
9 veracity that these are the 52 documents, is there any other  
10 reason why the week before trial we have to be arguing about  
11 the metadata?

12 MR. SCHUMAN: Well, there is, your Honor,  
13 because you've asked us a couple of times now whether  
14 there's a, quote, "smoking gun" in there.

15 THE COURT: I have.

16 MR. SCHUMAN: And I have politely deferred a  
17 couple of times because before I represent to the Court  
18 there are a couple of smoking guns, one of which is alluded  
19 to in the declaration of the pile, we need the metadata for  
20 who actually authored the documents.

21 So your Honor has made an in limine ruling on a  
22 couple of documents that there was a dispute whether they  
23 were authorized by Mr. Friedman or not. I know your Honor  
24 remembers that.

25 There's another document in the file that is to

1 Mr. Friedman from a count. The metadata we have so far  
2 shows it was written by Alex Friedman. He's the author.  
3 But we don't have the other metadata fields, your Honor, to  
4 permit us to make the proper conclusion with regard to what  
5 this document really is.

6 By the way, this is a document that was part of  
7 the Court-ordered production. We don't know where it came  
8 from, why it wasn't produced before. We have limited  
9 metadata that suggests it's another problematical document  
10 that we may want to use at trial that was never produced  
11 before.

12 THE COURT: Well, okay. So I understand the  
13 general level that you just said. And you said it was a  
14 document from Alan Friedman, so I take it it is some  
15 relative of Victor Friedman.

16 MR. SCHUMAN: Purporting be to be from Cohen  
17 Hospital.

18 THE COURT: I'm sorry. What?

19 MR. SCHUMAN: Purporting to be from a hospital,  
20 I think a children's hospital, discussing XU's patents,  
21 intellectual property, technology, but yet the limited  
22 metadata we have, your Honor, I want to be clear here, shows  
23 that it was written by Alex Friedman. It's addressed to  
24 Victor Friedman.

25 We would like the metadata that we believe the

1 attorney agreed on to help us figure out what that document  
2 really is.

3 The other document, your Honor, is addressed in  
4 this declaration.

5 THE COURT: So I've looked at the declaration.  
6 I couldn't understand the point. And that's not to say  
7 there isn't a point, but it needs to be explained to me  
8 better.

9 MR. SCHUMAN: We have --

10 THE COURT: I didn't get it.

11 MR. SCHUMAN: We have a claim in this case, your  
12 Honor, the 102(b) defense and one of counterclaims  
13 specifically is based on the pre-critical date, offers to  
14 sell, KnowledgeSHARE.

15 And your Honor heard argument the other day on  
16 the motion to exclude Dr. Chatterjee. Part of the argument  
17 was Dr. Chatterjee can't know what XU product was being  
18 offered to Allstate.

19 Prior to the supplemental production we just  
20 got, your Honor, we had Allstate presentations. What we  
21 just got without complete metadata is an Allstate  
22 presentation that embedded in hidden text says,  
23 KnowledgeSHARE platform.

24 The date of it is before the critical date.

25 This was the subject of our terminating sanctions motion,

1 your Honor. 102(b) is one of our defenses with respect to  
2 the patents in this case. Your Honor knows that that is one  
3 of our primary invalidity defenses.

4 We've been seeking documents. We've been  
5 hearing that Cisco cannot prove what the product was that XU  
6 was selling or offering to sell to Allstate prior to the  
7 critical date, and now we get a document with incomplete  
8 metadata that says KnowledgeSHARE platform right in it. We  
9 have a KnowledgeSHARE user manual. Dr. Chatterjee reviewed  
10 the KnowledgeSHARE code.

11 We think this document is incredibly  
12 significant, but the metadata is incomplete, your Honor, and  
13 before we can make further requests like to amend our  
14 exhibit list, maybe we might want to present this to a jury,  
15 we need the rest of the metadata.

16 But these documents -- this document was never  
17 produced before.

18 MR. CANTINE: Can I speak to that, your Honor?

19 THE COURT: All right. Go ahead.

20 MR. CANTINE: Number one, I would suggest that  
21 before we have any more argument, that they identify exactly  
22 which smoking guns they're going to contend are smoking guns  
23 so we can advance this.

24 We had an agreement with them on what kind of  
25 metadata we were going to produce from day one in this case.

1 We gave them that. They asked for more. We gave them more.  
2 I mean, when is this going to end? They've got everything  
3 they need. I don't know about some hidden field in some  
4 document. But we gave them -- everything that you required  
5 us to give them, we gave them and more.

6 THE COURT: Well, I did think that one of the  
7 things I saw in this declaration or affidavit was something,  
8 it was at the end of these paragraphs 11, 12, 13, where it  
9 said like in paragraph 12, it says, for the two example  
10 records above, we accept the source folder information as  
11 provided due to the e-mail difficulty in extracting them.

12 And then the next one, it goes to another  
13 e-mail. It seems to say the opposite, but I'm not sure --  
14 I'm not sure what conclusion to draw from that.

15 And I guess the other thing I didn't really  
16 understand about the -- does the supplemental production  
17 document that's on page 3 of this declaration, the two sides  
18 of the page, they were just the same document one side has  
19 the, quote, hidden content, and the other side does not.

20 MR. SCHUMAN: The document on the left, your  
21 Honor, if you look at the very top, the Bates number XU  
22 supplemental production, Supp.

23 THE COURT: Yes?

24 MR. SCHUMAN: That's from their supplemental  
25 production made in response to the Court's order.

1           The document on the right side of the page, the  
2     data on the right side of the page XU78631, that's the  
3     earlier version of the presentation that was produced.  
4     And so what is being depicted here is a difference between  
5     what was produced before and what was just produced in  
6     response to the Court's order.

7           THE COURT:   And so, okay.   And --

8           MR. SCHUMAN:   And to answer the Court's  
9     question, the difference between 12 and 13 is that for some  
10    of the e-mails, certain metadata was provided.   For others,  
11    it wasn't.   So what we're asking for in 12, there's certain  
12    metadata here, although what the declaration says is that  
13    the file name is not an actual file name.

14           In 13, for e-mail records where Mr. Friedman  
15    composed and sent or received e-mails, this shows the  
16    metadata that was provided.

17           And in the two examples above, XU provided  
18    neither a valid e-mail container, file name in the file name  
19    field, nor did they provide a valid e-mail folder in the  
20    folder field.

21           The point, your Honor is that in our motion for  
22    terminating sanctions, we identified files by name.   These  
23    are the files by name that Ms. Phillips identified had been  
24    completed from his computer, and I understood the Court's  
25    order to be saying produce those files.

1 THE COURT: Right.

2 MR. SCHUMAN: Without the file name, we can't  
3 know whether was being produced is the file name that we  
4 identified in the -- in our motion. We still cannot figure  
5 out based on what we have to date whether the files that  
6 were the subject of our motion and that we understood the  
7 Court to be ordering to be produced are what we have.

8 MR. CANTINE: Your Honor, it's difficult to  
9 respond to something that came in at noon before a 1:30  
10 hearing. But what my people tell me, all right, is that we  
11 gave them all the metadata. So to suggest that we're  
12 somehow picking and choosing out metadata for this file  
13 but not giving it up for that file is crazy. You hit a  
14 button, you give them the metadata, and we've given them  
15 that twice.

16 THE COURT: All right. I understand your  
17 position.

18 Mr. Schuman, you know, I hate to appear too  
19 stupid, but what is there that should convince me that there  
20 are file names that they are not giving to you? I mean,  
21 it's impossible for it to exist without a file name because  
22 I thought part of the problem here was some of these things  
23 had been harmed in transit.

24 MR. SCHUMAN: Meaning harmed in being destroyed  
25 and being recovered, however they were recovered.

1 MR. CANTINE: Oh, my God.

2 MR. SCHUMAN: Well, no. That was the testimony  
3 we heard on Monday, that in the course of trying to recover  
4 things, sometimes they're corrupted.

5 THE COURT: Right.

6 MR. SCHUMAN: That's my point, which is I don't  
7 know, and I don't hear the representation being made that,  
8 in fact, for each of the files, what we're not -- what we  
9 don't have is because it does not exist. We have not heard  
10 that from XU.

11 THE COURT: Well --

12 MR. SCHUMAN: And I appreciate --

13 THE COURT: I'm going to say you just heard from  
14 Mr. Cantine, though I'm quite sure that that is one step  
15 removed from attorney argument, my people tell me.

16 MR. SCHUMAN: So that's my point.

17 MR. CANTINE: It was an honest representation,  
18 your Honor.

19 MR. SCHUMAN: So I agree I think they should  
20 have an opportunity to either respond to this letter or for  
21 counsel to confer a little bit more, but we filed this  
22 declaration to try and advance the ball, to specify what it  
23 is we don't have.

24 THE COURT: Okay. And, believe me, I'm not  
25 being critical, and I also, of course, am not criticizing

1 Mr. Cantine's not being able to respond more fully to  
2 something that happened at noon. Fortunately, there's a  
3 whole great big weekend to argue about this.

4 And so I better understand why you're interested  
5 in it, Mr. Schuman, so I appreciate that. I imagine Mr.  
6 Cantine probably already did understand.

7 So why don't you all talk to each other over the  
8 weekend, and if you can't come to some appreciation of each  
9 other's positions, you know, maybe Mr. Cantine, if push  
10 comes to shove, maybe you ought to see if you can't get  
11 Mr. Harris to file something in response.

12 MR. CANTINE: Very well, your Honor.

13 MR. SCHUMAN: Thank you, your Honor.

14 THE COURT: All right. So that leaves the issue  
15 of scheduling.

16 MR. CANTINE: I had one other issue I wanted to  
17 address, your Honor, very briefly.

18 THE COURT: All right.

19 MR. CANTINE: I'm not going to reargue  
20 RemoteXpert and fraud and Expert Advisor and all of the  
21 discovery we didn't get, but we did make -- we followed your  
22 Honor's scheduling order procedures and we filed a letter  
23 and then we had some oral argument. And I want to make sure  
24 I preserve my appellate record here.

25 THE COURT: Sure. Okay.

1 MR. CANTINE: So out of an abundance of caution,  
2 because some of the appellate courts require a formal motion  
3 to compel be denied, in order to preserve that on appeal and  
4 there's some dispute between --

5 THE COURT: If you want to file a motion to  
6 compel, that's fine.

7 MR. CANTINE: Thank you. I would like that  
8 opportunity.

9 And then the last two issues, which I'm sure  
10 you're getting to is Mr. Braddock and the trial date.

11 THE COURT: Right. So I've had some further  
12 thoughts of one kind or another, but on Wednesday, you all  
13 were going to think about it.

14 And, Mr. Cantine, you're the plaintiff, too.  
15 What is your current view?

16 MR. CANTINE: In terms of your proposal, trying  
17 a patent case first, while we appreciate the offer, we're  
18 going to respectfully decline on that.

19 THE COURT: All right. Anything else?

20 MR. CANTINE: Not from me, your Honor.

21 THE COURT: Okay. Mr. Schuman, what do you have  
22 to say?

23 MR. SCHUMAN: I think we need to know when  
24 Mr. Braddock is going to be here for the Daubert hearing. I  
25 think we've been going at this long enough. We have

1 obviously serious questions with regard to challenging Mr.  
2 Braddock's opinion. Whether it's just a patent trial or  
3 not -- if it is just a patent trial, your Honor,  
4 Mr. Braddock has an opinion about that, that's the subject  
5 of our Daubert motion.

6 THE COURT: Yes.

7 MR. SCHUMAN: And before we talk about whether  
8 there will be just a patent trial or when, I think we need  
9 to know when Mr. Braddock is finally going to show up for  
10 this Daubert hearing.

11 THE COURT: Well, here's the thing, as I'm  
12 pretty sure from what Mr. Cantine said before is that the  
13 time proposed is next Friday, and as it happens, I have  
14 moved something off of my schedule so I could hear from him  
15 on next Friday afternoon.

16 And so I have a second proposal, which is this.  
17 I will schedule the time -- I have to check my calendar  
18 here, but I will schedule the time, assuming that everybody  
19 is agreeable, for Mr. Braddock to be here on Friday  
20 afternoon. It may be by that time that, hopefully before  
21 then, we'll have some decision on some of these issues that  
22 are still open, which may narrow the scope of the dispute  
23 some.

24 But the thing is, it seems to me unlikely that  
25 I'm really going to be excited about making some final

1 decision about Mr. Braddock on Friday afternoon. So what I  
2 was thinking is that the backup plan I had in mind was,  
3 because I didn't sense a warm, fuzzy reaction to let's do  
4 the patent trial first, was maybe just bifurcating damages  
5 and just trying the liability portion.

6 MR. SCHUMAN: I would like to talk to Cisco  
7 about that, your Honor. I think under these circumstances,  
8 given how long this case has been pending and given all the  
9 work that has been done, I think two trials under  
10 circumstances where at least we believe there shouldn't be  
11 any, but if there's one, there should be one trial.

12 The other problem here, your Honor, is the fact  
13 that the pendency of this lawsuit places a cloud over those  
14 products that are actually still on the market, which is  
15 very few of the products in this case. But as your Honor  
16 knows, discovery was conducted here of certain Cisco  
17 customers, and the business unit at Cisco is very anxious  
18 about the resolution of this case with respect to its  
19 ability to market and sell these products.

20 So we're fully prepared to go to trial on all  
21 issues and resolve them.

22 THE COURT: But the liability would take care of  
23 that issue.

24 MR. SCHUMAN: Well, it might, your Honor, but I  
25 also -- well, another idea, and I don't know if this would

1 help your Honor with the problem that you were describing,  
2 but I mean one thing we could do, I heard Mr. Cantine ask  
3 for a one or two-week continuance.

4 This trial was originally scheduled to go for  
5 two weeks, I believe, and if a one-week continuance, if we  
6 had Mr. Braddock on Friday, the 8th of next week, perhaps a  
7 one-week continuance of the trial date would work.

8 THE COURT: Well, it would only work if it  
9 was then a five-day trial, because I've got somebody else  
10 that --

11 MR. SCHUMAN: I understand, your Honor. What  
12 I'd like to do, if it's okay, is go back and confer with my  
13 client before I can respond to that proposal.

14 THE COURT: That's fine. And part of it is, if  
15 we did do that, I don't think it would actually alter the  
16 preparation so much. But, in any event, then Mr. Cantine,  
17 maybe you want to think about it, too.

18 MR. CANTINE: I certainly want to think about it  
19 and confer with my client.

20 I guess I have one question. This kind of next  
21 trial. If we did the one-week delay, you said we could get  
22 five days in before you had another trial. Do you know how  
23 long that trial is going to be?

24 THE COURT: Well, that trial is supposed to last  
25 four days and then I have a trial in another case that

1 starts the following Monday, and I believe the four-day  
2 trial, I believe that's Easter week.

3 MR. CANTINE: It's coming up on a lot of  
4 holidays.

5 THE COURT: Yes. So I think that's actually a  
6 four-day week, and I'm hazy on that right now. But the  
7 following week I have another trial that I've already bumped  
8 once.

9 MR. CANTINE: And so if we're talking about, it  
10 sounds to me like Mr. Schuman is willing to bump it a week  
11 as long as we can keep it together, you know, if we move  
12 both of those, or just go after them, are we talking three  
13 weeks?

14 THE COURT: I don't understand what you mean, go  
15 after them.

16 MR. CANTINE: You said you had the two trials  
17 coming up, right, after us.

18 THE COURT: Well, I've got other things, but  
19 those were the -- and my impression was, it's nice of Mr.  
20 Schuman to say start the trial the following week, but my  
21 impression was that he does have Cisco people coming in from  
22 all over the world or something, so that, in fact, I don't  
23 think he's exactly saying let's go for a month delay.

24 MR. CANTINE: I appreciate your considering this  
25 and I appreciate Cisco's willingness to consider it as well.

Nourbakhsh - redirect

1 I just think it's going to be very difficult, like you said,  
2 having Mr. Braddock Friday afternoon going to trial on  
3 Monday.

4 THE COURT: Well, see, the other thing is, I'm  
5 also wondering about this, which is, you know, I read the  
6 briefing on damages. You know, Mr. Braddock has the  
7 opinion, if I recall correctly, that Cisco would pay \$30  
8 million for two patents, for licensing the two patents for  
9 which they sold \$2 million worth of products.

10 That is a hard starting place to, like, start  
11 and say, yes, that sounds like a logical thing. So, you  
12 know, part of the reason why I wanted the hearing on Dr.  
13 Nourbakhsh and Mr. Braddock is I thought there were issues  
14 that weren't so easily just resolved by reading the briefs,  
15 I believe as there were with Cisco's experts, where you were  
16 talking about discrete things.

17 And so part of what I'm wondering is, you know,  
18 if I do say, you know, Mr. Braddock's damages testimony is  
19 going to be limited to, you know, this as opposed to this,  
20 and then I'm also partly wondering, you know, summary  
21 judgment motion knocked out this or that, there's going to  
22 be a lot of scrambling around to have Braddock conform his  
23 testimony to whatever he's allowed to testify about and  
24 whatever is left in the case.

25 And so that's, to some extent, what I'm -- and I

Nourbakhsh - redirect

1 guess one of the questions I have was that at some point,  
2 Cisco said a reasonable royalty analysis was three to  
3 five percent of sales and, you know, I hadn't read  
4 Mr. Braddock's report.

5 If it turned out to be that's what he was  
6 testifying in the patent world, would there be an objection  
7 that's not in his report?

8 MR. CANTINE: I'm not prepared to answer that  
9 right now.

10 THE COURT: No, no, no. I wasn't looking at  
11 you.

12 MR. CANTINE: All right.

13 THE COURT: I was looking at him.

14 MR. SCHUMAN: Your Honor, Mr. Braddock  
15 identifies two licensing agreements that he thinks are  
16 comparable, and I think that was where you get the three to  
17 five percent number from his report, which when we addressed  
18 his opinions, we didn't take issue with that. Our expert  
19 did not take --

20 THE COURT: All right.

21 MR. SCHUMAN: But those three to five percent of  
22 sales, of course, is not where Mr. Braddock ends up. He  
23 ends up with that larger number based on something called  
24 K-World.

25 THE COURT: Well, no, no, but that's where there

1 are methodological issues and reliability issues.

2 MR. SCHUMAN: Right. I don't think we -- I  
3 think we have not taken a contrary position that if there  
4 was infringement, there was liability, and if the products  
5 had sold anything, because some have a three to  
6 five percent, we did not take issue with that as a  
7 reasonable rate.

8 THE COURT: All right. Well, that's helpful,  
9 because what I would be concerned about is we're having a  
10 trial on damages and you have no damages testimony. But  
11 it's kind of sounds like you will have some, if you don't  
12 have everything. I mean, maybe you'll have everything. If  
13 you don't have everything, you will have some.

14 All right. I guess we'll resume this discussion  
15 on Tuesday. And --

16 MR. CANTINE: I'm sorry, your Honor. Can you  
17 get me a time for Friday afternoon?

18 THE COURT: Oh, yes. Thank you. Thank you.  
19 Let me see here. Yes. How about -- sorry to do this. How  
20 about 2:00 o'clock?

21 MR. CANTINE: That's fine with us, your Honor.

22 MR. SCHUMAN: That's fine with us, your Honor.

23 THE COURT: All right. 2:00 o'clock.

24 All right. Anything else for today?

25 MR. CANTINE: Not from me.

Nourbakhsh - redirect

1 MR. SCHUMAN: No, your Honor.

2 THE COURT: All right. Well, thank you. We'll  
3 be in recess. I will see you all on Tuesday.

4 And, Mr. Cantine, if you need to file a  
5 declaration or affidavit, try to do it by the close of  
6 business Monday, okay, on the metadata?

7 MR. CANTINE: Yes. Will do. Thank you.

8 THE COURT: All right.

9 (Counsel respond, "Thank you, your Honor.")

10 (Court recessed at 5:33 p.m.)

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Nourbakhsh - redirect

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